

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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Appeal of Kalorama Citizens Association, pursuant to)
11 DCMR § 3100, from the administrative decision of)
David Clark, Director, Department of Consumer and)
Regulatory Affairs issuing Building Permits Nos. B455571)
and B455876 respectively, to Montrose, LLC, to adjust)
the building height to 70 feet and to revise penthouse)
roof structure plans to construct an apartment building)
in the R-5-D District at 1819 Belmont Road, N.W., and)
from the issuance of the original Building Permit No.)
B449218, dated March 11, 2003.

BZA No. 17109-C

MOTION TO RECONSIDER ORAL DECISION OF OCTOBER 28, 2014

Appellant Kalorama Citizens Association (KCA) respectfully moves that the Board reconsider its oral decision on the issue remanded to it by the District of Columbia Court of Appeals (the Court), reached at the meeting of October 28, 2014, and decide instead that the sixth level of the subject property is not an "attic" under the Zoning Regulations of the District of Columbia. No written Order incorporating that decision having yet been issued as required by 11 DCMR 3125 and DC Official Code 2-509(e) (2001), this motion does not fall within the terms of 11 DCMR 3126, "Reconsideration or Rehearing". The purpose of the motion is to urge the Board to act expeditiously to correct an erroneous decision, having reasonable regard for avoiding waste of time and effort on the part of the Board, supporting personnel in the District government, the citizens whose interests this appeal seeks to protect, and the Court. The Board may wish

Board of Zoning Adjustment
District of Columbia
CASE NO. 17109
EXHIBIT NO. 123A1

123 EX No. 2

to bear in mind that this Appeal is now in its twelfth year, and that as of now more than five of those years have been consumed in waiting for the Board to act on remands from the Court on the “attic” issue.

Background

This case is before the Board for the second time on remand from the Court on that issue. The full background of this Appeal up to the time of the initiation by KCA of the second case before the Court in 2011 (no. 11-AA-0851) can be found at pp. 1-3 of the Board’s Decision and Order After Remand dated June 15, 2011, which appears at page 1 of the Appendix to the Brief submitted by KCA to the Court in that case (attached hereto as Exhibit 3). As indicated there, the Court first remanded the “attic” issue because the Board had not adequately addressed it in its previous order, no. 17109 of November 8, 2005, and thus had also failed to address an issue that had been raised by ANC 1C. The Court had rendered this decision after having received briefs from KCA and ANC 1C as Petitioners and the Board as Respondent, and having heard full oral argument.

By contrast, the Court’s second remand of this issue, now before the Board, was done in response to a motion for remand by the Board itself, through the Attorney General as its counsel, made solely on the basis of the record and the brief filed by KCA. The sole issue before the Court was whether the findings of

fact on the basis of which the Board decided that the sixth level of the building is an “attic” – findings that the Board would necessarily have to reaffirm in order to reach the same decision now -- are supported by substantial evidence in the record. The Board’s counsel apparently concluded and communicated to the Board that the record would not support the Board’s order, citing in the motion just one of the deficiencies that KCA had noted in its brief -- namely, that the order was based on plans that had later been revised. Counsel filed no brief on behalf of the Board, and there was no oral argument or decision on the merits by the Court. The motion, the text of which is attached hereto as Exhibit 1, went on to state that “the BZA wishes to reconsider its decision and to conduct further proceedings as may be appropriate.”

KCA has learned that the Board met on October 28, 2014, considered the remanded issue, and decided to reaffirm its previous decision that the sixth level of the subject property is an “attic”. KCA had received no notice of the meeting despite being a party both to the BZA appeal and to the Court case from which the remand emanated, nor did the Board invite the parties to submit legal memoranda on the remanded issue, as it had done with the first remand. KCA thus must rely on the video available on the Office of Zoning website for information as to what went on during the Board’s deliberations. From that

source it appears that the Board, perhaps as a result of the lapse of time and the turnover in the Board's composition, was not accurately informed as to certain facts in the record that are material to the "attic" issue, and that it may have been unaware that its Order was based in material part on project plans that were later replaced and that the issue had been remanded on the Board's own motion.

However that may be, by its action on October 28, 2014 the Board in our view has set in train a process by which the Court of Appeals may eventually be presented with the same Board decision on the "attic" issue that the Court had previously remanded at the Board's request, and which will remain – since the record within the meaning of 11 DCMR 3127 and DC Official Code 2-509(b) and (c) (2001) remains unchanged -- just as lacking in support in that record as it was in 2011. To demonstrate to the Board why this is true, we have appended KCA's brief In Court of Appeals case no. 11-AA-0851 and the Appendix to that brief (Exhibits 2 and 3). This seems appropriate in view of the fact that the Board's motion seeking remand of the case, and the Board's intention stated therein to reconsider its decision, were apparently based solely on that brief and the BZA case record presented in the Appendix. Following is a summary of the argument presented in those documents (a more extended summary is found at pp. 8-10 of KCA's brief):

Definition of “attic”.

The Board and KCA agree that the applicable definition of “attic” is:

“the part of a building immediately below the roof and wholly or partly within the roof framing: a garret or storage space under the roof.”

As to whether the sixth level is “immediately below the roof”:

The Board and KCA also agree that positioned 6’ 5 ¼” above the sixth level’s floor there are 2x10’s labeled in the plans as “collar ties” spaced a maximum of four feet apart running front to back and interspersed among the ceiling rafters. The Board and KCA agree that a ceiling installed on those members would divide the vertical space between the sixth level’s floor and the building roof into two separate spaces, only the uppermost of which would be “immediately below the roof of the building”. The Board’s Order 17109-C found that there was no such ceiling, and that there was an open space between the collar ties and ceiling rafters and the roof and that therefore all of the sixth level was “immediately below the roof”. This finding is unsupported by any evidence in the record, but rather is contradicted by substantial evidence, for the following reasons:

- (a) the plans explicitly label the sixth level as having a ceiling, and
- (b) the project architect testified that the sixth level has a finished wallboard ceiling.

Therefore the sixth level is not “immediately below the roof”. Moreover,

(c) a portion of the building’s roof is installed on the building’s roof structure (penthouse), which provides access to the roof deck and of course has a floor.

So even if there were no ceiling installed on the collar ties, the sixth level would not be “immediately below” that portion of the roof.

As to whether the sixth level is “wholly or partly within the roof framing”:

The Board found that the “collar ties” are part of the roof framing because, the Order asserted, they form the base of a triangle of which the other two sides are the peaked portion of the roof that was originally depicted in the plans as covering the roof structure. This or any other finding that the “collar ties” are part of roof framing, is unsupported by any evidence in the record, but rather is contradicted by substantial evidence, for the following reasons:

(a) the final plans did away with the peaked roof, replacing it with a single sloping panel facing the front, so the presumed “triangle” has only two sides;

(b) even if the peaked roof had been retained, the sides of the “triangle” would not meet its base, since there is no evidence that the “collar ties” are connected in any way to any of the building’s roof rafters –

either those supporting the flat portion of the roof or those supporting the portion of the roof covering the penthouse;

(c) the project architect's testimony ascribed a wholly different structural function to the "collar ties" – namely, stiffening the building against racking in a front to-back direction;¹ he did not testify that they played any role in supporting or securing the roof. In fact he distinguished their function from the characteristic function of collar ties properly so called that run between the rafters of the two sides of a peaked roof and act in tension to keep the roof from spreading, and stated that the "collar ties" in this building do not act in tension.

So even if there were no wallboard ceiling, the sixth level would not be an "attic" because it is not "wholly or partly within the roof framing".

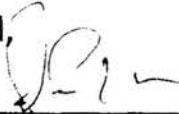
Conclusion

We therefore respectfully urge the Board to reconsider its oral decision of October 28, 2014, and hold instead that the sixth level of the subject building does not qualify as "attic". Otherwise the Board will in effect be sending back to

¹ The Board found that the "collar ties" performed this structural function. The issue of whether the "collar ties" were structural was initially relevant because 11 DCMR §199.1 (definition of "gross floor area") requires that the "structural headroom" of an attic be less than 6 feet 6 inches in order for the attic to be excluded from gross floor area.

the Court a decision based on findings of fact that are both unsupported by evidence in the record and contradicted by substantial evidence, which the Board itself had asked the Court to remand so that the Board could reconsider it.

Respectfully submitted,



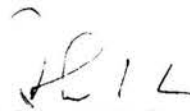
John Lawrence Hargrove
 Counsel for Petitioner Kalorama Citizens Association
 D.C. Bar No. 35413

CERTIFICATE OF SERVICE²

A copy of this instrument was sent by United States mail on this sixth day of January, 2015 to:

Ellen M. McCarthy, Acting Director
 Office of Planning
 1100 4th Street, S.W., Suite E650
 Washington, D.C. 20024

Melinda Bolling, Esquire
 General Counsel
 Department of Consumer and Regulatory Affairs
 1100 4th Street, S.W.
 Washington, D.C. 20024



John Lawrence Hargrove

² KCA is informed that Montrose, LLC, which had been an intervenor in BZA case 17109 but was not a party to Court of Appeals case 11-AA-0851 from which this remand emanated, no longer exists. KCA stands ready to serve this instrument on any successor in interest that may be brought to its attention.

EXHIBIT 1

No. 11-AA-851

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

KALORAMA CITIZENS ASSOCIATION,
PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
RESPONDENT.

ON PETITION FOR REVIEW FROM AN ORDER OF THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

**CONSENT MOTION OF THE DISTRICT OF COLUMBIA BOARD OF ZONING
ADJUSTMENT TO REMAND**

Respondent, the District of Columbia Board of Zoning Adjustment (“BZA”), moves this Court to remand this case for it to reconsider its decision, which is the subject of this petition for review. In light of its reference to plans without accounting for those plans’ subsequent revision, the BZA wishes to reconsider its decision and to conduct further proceedings as may be appropriate. Petitioner consents to this request.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

DONNA M. MURASKY
Deputy Solicitor General

EXHIBIT 2

Parties, Intervenors, and Counsel:

A. In Board of Zoning Adjustment Appeal No. 17109-C:

Kalorama Citizens Association, Appellant
John Lawrence Hargrove, Esq., Counsel

Department of Consumer and Regulatory Affairs, Appellee
Jay Surabian, Esq., Assistant Attorney General, DCRA, Counsel

Montrose LLC, Intervenor
Mary Carolyn Brown, Esq., Counsel

B. In Appeal No. 11-AA-0851:

Kalorama Citizens Association, Petitioner
John Lawrence Hargrove, Esq., Counsel

D.C. Board of Zoning Adjustment, Respondent
Richard Love, Esq., Office of the Attorney General, Counsel

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ISSUES PRESENTED FOR REVIEW

Were the findings of fact upon which the Board determined that the sixth level of the subject building qualified as an “attic” supported by substantial evidence in the record as a whole?

STATEMENT OF THE CASE

Kalorama Citizens Association (“KCA”) seeks review of Order 17109C of the Board of Zoning Adjustment (“BZA”, or “Board”), which was issued after remand to the Board by this Court of one issue raised in *Kalorama Citizens Association v. D.C. Bd. Of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007), namely, whether the sixth level of the subject building of that case qualified as an “attic”. In 2003 KCA had appealed to the BZA the issuance of permits to Montrose LLC by the Department of Consumer and Regulatory Affairs for a construction project at 1819 Belmont Road, N.W.. ANC 1C joined as a party. 1819 Belmont was originally a 3-story plus basement row house. Project plans depicted redeveloping it into an apartment building of six interior levels plus basement, a roof structure housing a stairway that connected the sixth level to the roof, and a roof deck. KCA's Appeal complained of, among other things, excessive height and density of the building, which extended up above neighboring row houses by several stories. The height and density were made possible by the exclusion from DCRA’s calculation of “gross floor area” of the floor area of certain parts of the building, including the sixth level, which was labeled “attic” by the developer. The Board granted the appeal in part and denied it in part. KCA and ANC 1C sought review of the Order by this Court, in respect of, among other things, the Board’s determination that the level was an attic with structural headroom of less than 6’ 6” and that consequently its floor area did not need to be included in the calculation of gross

floor area. (Under the terms of 11 DCMR §§ 199.1, the "horizontal space of the several floors" of a building are included in "gross floor area". "Attic space" is included, but only if it has "structural headroom" of 6 feet 6 inches or more.)

The Board had found that the collar ties that form part of the sixth level ceiling framing were less than 6 feet 6 inches in height above the floor. The Board had also found that the collar ties worked to brace the building against racking in a north-south (i.e. lengthwise) direction and concluded that they were therefore structural in character. As the Court recognized, it does not follow from these findings that the seventh level is an "attic" by the applicable definition. Consequently the Board's further conclusion that the sixth level space was properly excluded from FAR calculations was unsupported by the requisite finding of fact, and the Court remanded the definitional issue.

If, as KCA and the ANC 1C argued, the sixth level did not qualify as an "attic", then its floor area would have been required to be included in gross floor area regardless of the structural character of the ceiling, since it would be merely one of the "several floors" of the building that are required to be included. *11 DCMR §199.1, definition of "gross floor area"*.

STATEMENT OF FACTS

1. The plans depicted conversion of a three-story row house into a six level plus basement apartment building. They depicted a top apartment consisting of the fifth and sixth levels, with a ceiling 6 feet 5 1/4 inches above the floor of the sixth level; a roof structure housing a staircase connecting level 6 to the roof structure and providing access to the roof and roof deck; and a roof deck. *Record Exhibit ("RE") 31, App. pp. 14 and 16, section drawings from project plans.*

2. The sixth level of the building, which the plans label as “attic”, does not extend all the way to the front, but is set back by approximately 1/5 the length of the building at that level. As a result the fifth level has a very high ceiling at the front of the building, which toward the rear of the building becomes the ceiling of the sixth level.

3. This sixth level ceiling consists of gypsum wallboard mounted on the underside of ceiling beams running front to back, and also on the underside of structural members (either wooden or engineered lumber 2x10s) that serve as collar ties. The collar ties also run front to back and are interspersed among the ceiling beams and set 48 inches apart. *RE 31, App. pp 14 and 17, Section drawings from project plans; Transcript 04/06/04, Testimony of Norman Smith, Architect for Montrose LLC, pp. 134, 138-39, 146-48, App. pp. 33-48.*

4. The collar ties also serve structurally to brace the building from racking in a north-south (i.e. lengthwise) direction. *Order No. 17109-C (“Order”), p. 4, App. p. 4.*

5. Above the ceiling beams and collar ties are 2x10 roof rafters gently sloping from front to back. *T. 4/06/04, Testimony of Norman Smith, App .p. 148.*

6. The original plans depicted a two-sided gabled or peaked roof over the roof structure, with the front roof panel interrupted by an enclosed walkway with vertical walls and a flat roof, to provide access to the roof deck. Modified plans reduced the footprint of the roof structure by eliminating the rear panel of the peaked roof and enclosing the rear of the roof structure with a vertical wall. *RE 31, App. pp 14 and 17, Section drawings from original and revised project plans.*

ARGUMENT

STANDARD OF REVIEW

The Board's conclusions of law will be upheld if, but only if, it has made findings of fact on each material contested issue of fact, *flowing rationally from substantial evidence in the record as a whole*, from which its conclusions are rationally drawn. [emphasis added] See D.C. Code §2-510(a) (2001). *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. App. 1994); *Myrick v. District of Columbia Board of Zoning Development*, 577 A.2d 757 (D.C.1990); *Levy v. District of Columbia Board of Zoning Adjustment*, *supra*, at 746, 753; *Communication Workers of America v. District of Columbia Commission on Human Rights*, 367 A.2d. 149, 152 (D.C. App. 1976); *Dietrich v. Board of Zoning Adjustment*, *supra*; *Palmer v. Board of Zoning Adjustment*, D.C. App., 287 A.2d 535 (1972); *A.L.W., Inc. v. Board of Zoning Adjustment*, 338 A.2d 428, 430 (D.C. App.1975).

SUMMARY OF ARGUMENT

1. In Findings of Fact 6 and 9, the Board found (a) that the sixth level of the building has no ceiling, (b) that there is thus an open area between the sixth level ceiling rafters and collar ties and both the flat and supposedly peaked portions of the roof, and (c) that therefore all of the sixth level is immediately below either the flat or peaked roof. None of these findings flows rationally from substantial evidence in the record as a whole.

As to the finding that there is no ceiling, the Board identifies no evidence affirmatively showing that there is no ceiling, but rather rests its finding on the proposition that the evidence does *not* show that there *is* a ceiling. The sole evidence on which the Board

relies for this purpose – a section drawing from the plans depicting the structural skeleton of the building – itself specifically labels the sixth level as having a ceiling, but otherwise has no evidentiary bearing on the question of whether or how the framing of any ceilings or walls is to be enclosed. Moreover, there is evidence in addition to the section drawing, including the explicit testimony of the project architect, affirmatively establishing that the sixth level has a ceiling, comprised of gypsum wallboard mounted on the ceiling rafters and collar ties.

As to the finding of an open space between all of the sixth level and the roof, the space between the sixth level and the supposedly peaked roof is not open but is obstructed by the floor of the “roof structure” that the roof covers, and thus the portions of the sixth level below the roof structure are not “immediately below the roof” and would not be regardless of whether there is a sixth level ceiling.

Since the definition of “attic” requires that an attic be immediately below the roof, for this reason alone the Board erred in concluding that the sixth level was an attic.

2. The Board’s Finding of Fact 7 that the collar ties are a part of the roof framing, from which it concludes that the sixth level is “within the roof framing” (*Order, p. 6, App. p. 6*) is unsupported by substantial evidence in the record as a whole. To support this finding the Board relies solely on the proposition that the two sides of the supposedly peaked portion of the building’s roof form the sides of a triangle of which the collar ties form the base. However, there is no peaked roof in the final project plans, it having been replaced by a single sloped panel facing to the front (interrupted by a covered walkway to the front roof deck), and a vertical wall facing to the rear. Consequently the Board’s putative triangle has only two sides. Even if there were a peaked roof, the collar ties could

not serve to prevent its rafters from spreading because they are unconnected to and physically distant from those rafters. There is no evidence that the collar ties have any connection to any roof rafters, and the project architect took pains to ascribe a wholly different structural function to them: stiffening the building against racking in a front-to-back direction.

Since the definition of “attic” requires that an attic be wholly or partly within the roof framing, for this reason alone the Board erred in concluding that the sixth level was an attic.

DISCUSSION

1. THE FINDINGS THAT THE SIXTH LEVEL HAS NO CEILING AND THAT THERE IS AN OPEN AREA BETWEEN ALL OF THE SIXTH LEVEL CEILING RAFTERS AND COLLAR TIES AND THE BUILDING’S ROOF.

The Board is correct in its determination that, of the three alternative definitions of “attic” provided by *Webster’s*, the applicable dictionary definition is the third:

“c. the part of a building immediately below the roof and wholly or partly within the roof framing: a garret or storage space under the roof.”

Moreover, the Board correctly proceeds from the premise, which seems beyond dispute, that a ceiling installed on the collar ties and ceiling beams that are positioned 6’ 5 ¼” above the sixth level’s floor would divide the vertical space between that floor and the roof into two separate spaces, only the uppermost of which would be “immediately below the roof of the building” -- just as drywall walls divide horizontal space into separate rooms. Where the Order is erroneous is not in this premise, but in its finding of fact that there is no such ceiling and that all the vertical space between the sixth level floor and the roof rafters is open.

The Board’s position on the ceiling issue may be summarized as follows: The Board having asserted the negative proposition that there is no ceiling, it was incumbent on it to

identify evidence affirmatively showing that there is no ceiling. Rather than discharge that burden, however, the Board apparently rests its finding on the proposition that the record contains *no* evidence that there *is* a ceiling. Both that proposition, and the Board's assumption as to what evidence must be identified in order to sustain these findings, are erroneous.

The Board's findings of fact on this issue are the following:

"6. The plans show no finished ceiling to the sixth level because interspersed among the collar ties and ceiling rafters of the sixth level is open space; therefore, there is no full ceiling or floor between the floor of the sixth level and the roof of the building.

"9. Because there is no finished ceiling to the sixth level, all of that level is immediately below the roof of the building. . . ."

These findings, which the Board bases solely on a section drawing from the original project plans, *RE 31, App. p. 14*, do not flow rationally from, and in fact are contrary to, substantial evidence in the record, for the following four reasons.

A. The drawing on which the Board relies explicitly states that the sixth level has a ceiling. The architect's drawing just mentioned indicates a plane located 6'5 1/4 inches above the floor of the sixth level and extending all the way to the front of the building, and plainly labels it "ceiling", a notation that perhaps the Board overlooked. The same is true for the revised plans. *RE 31, App. p. 17*. The Zoning Regulations do not define "ceiling", so, under 11 DCMR §199.2(g), the governing definition is the applicable definition provided by *Webster's Unabridged Dictionary*: "The overhead inside lining of a room." The Board's findings speak of the absence of a "finished" ceiling or a "full ceiling", and the Board further hedges by stating that "this 'ceiling' is *essentially* unfinished". Order p. 5, Appendix p. 5 (emphasis added). What the Board means by, for example, "essentially unfinished" is not entirely clear, but it is clear that the drawing on which the Board relies labels the sixth level as having a ceiling without any

such qualifications or reservations, and that a room that has a ceiling has an overhead lining such as is commonly provided by gypsum wallboard.

B. Aside from explicitly labeling the sixth level as having a ceiling, the drawing on which the Board relies is of no evidentiary relevance as to the enclosure of ceiling or wall framing or lack thereof. Assuming for the sake of argument that the architect had not labeled the sixth level ceiling as such in this elevation drawing, the absence of such a notation would not support a finding that there was to be no ceiling at that level, any more than its failure to show the location of plumbing fixtures would support a finding that the building was to be without indoor plumbing. That is because the obvious purpose and function of this section drawing is to depict the structural skeleton of the building as viewed from the side—the sole exceptions being the sixth level “ceiling” notation just mentioned and the depiction of the roof deck and interior staircase to the roof. That being the case, if the architect had omitted the sixth level ceiling notation, this drawing would provide no evidence at all as to whether any particular set of wall studs or ceiling rafters was to be enclosed, or if so by what material, or about myriad other features that the project will include once completed. What it does do, as a part of approved project plans, is to create a presumption that all of those features, even if nowhere explicitly depicted in the plans, will comply with the applicable codes, and if they do not, that the completed project will not receive approval. The Board, however, goes so far as to say (again overlooking the “ceiling” notation) that, because “the plans show no finished ceiling”, for the builder to enclose that ceiling would amount to “unlawful construction” (Order p. 7, Appendix p. 7). If that is true, then it would be likewise unlawful for the builder to mount gypsum wallboard or some similarly code-compliant material on *any* of the wall studs or ceiling

rafters in shown in this drawing, for which the drawing provides no indication that wallboard is to be applied -- a patent absurdity.¹

C. The project architect testified that the sixth level has a ceiling, composed of gypsum wallboard, and there is other affirmative evidence to that effect. In addition to the fact that the section drawings from the plan consistently label the sixth level as having a ceiling, the Board's finding of the absence of a ceiling is directly contravened by the testimony of the project architect, Norman Smith. In a colloquy about the project plans with Board Member Parsons and Board Chairman Griffis, Mr. Smith was asked specifically whether the "attic" had a finished ceiling and explicitly and repeatedly stated that the "attic" was to have a finished ceiling, thus removing any doubt on the issue, and went on to discuss how the gypsum wallboard would be installed. *Transcript 04 06 04*, pp. 138-39, *Appendix pp.37-38*.

On March 16, 2004, three weeks earlier, DCRA's representative, Faye Ogunneye, testified about the "attic" that "the finished ceiling isn't in place yet." [*emphasis added*] She recounted how a DCRA inspector had visited the site to confirm that the sixth level headroom would be less than 6' 6" by measuring from the floor to the "underside of the collar ties", not the "finished ceiling" -- clearly indicating an expectation on her part that the ceiling would be installed in the course of completion of the project as planned. *Transcript 03 16 04*, p. 246, *App.31*.

In other ways the record as a whole indicates such an understanding and expectation: The members designated as *ceiling* beams or rafters (noted by the Board in Finding of Fact 6 and 9), which were interspersed among the collar ties at the same level above the floor, served no purpose in the building other than to provide the necessary support for a ceiling. This is because, on the one hand, the spans between the collar ties were as much as 4 feet on center² and thus

¹ So far as we can determine from project plans included in the record, the plans contained no reference to wall or ceiling covering, except that the list of abbreviations included in the plans by the Architect contains an abbreviation for gypsum wallboard. *Re. 29, Appendix p.13*. It is evident that neither the builder's architect nor the permitting officials in the Department of Consumer and Regulatory Affairs regarded such references as necessary for approval of the plans.

² *Testimony of Norman Smith, Transcript 04 06 04, p. 134, Appendix p.33.*

were too wide for the collar ties alone to provide adequate support for a ceiling, and on the other hand only the collar ties were found to be structural members.

It bears noting that the Board's order disparages the testimony of the project architect on this issue, stating that what is controlling are the plans. *Order p. 7, Appendix p.7*. It is certainly the case as a general matter that the plans control as to any feature of the project depicted by the plans or otherwise disclosed by the written plans, which are after all the basis for the issuance of the building permits. The problem with the Board's position on the ceiling issue in this case, however, is that it opted to ignore the testimony of the architect who created the plan that explicitly addressed the question of the sixth level ceiling, in favor of a part of the written plans that (as incompletely read by the Board) was silent on that issue and thus without probative value on it. As already seen, there may well be many details of a planned project on which the written plans are silent, and in such cases the most authoritative source of information is the testimony of the project architect, followed by the permitting authorities. The Board itself recognized this in the present case by repeatedly eliciting from the architect information about the project that could not be gleaned from the written plans.

D. There is no open area between the sixth level ceiling rafters and collar ties and the supposedly peaked portions of the roof of the building; consequently it is not the case that all of the sixth level is "immediately below the roof."

Specifically, the Board found that "[b]ecause the plans show no finished ceiling to the sixth level, all of that level would be immediately below the roof of the building. Part of the roof is flat and the sixth level is just below it. Part of the roof of the building is peaked, and there would be an open area between the sixth-level ceiling rafters/collar ties and the peaked roof."

There are two things wrong with this finding:

First: there is no "peaked roof", as a more diligent attention to the record would have disclosed. The original plans called for a roof structure, as envisaged in 11 DCMR §400.7, which was to be covered by a two-sided peaked or gabled roof, as shown in *RE 31, App. p.14*.

Very early in the project, however, the plans were changed to call for a smaller roof structure with a single, sloped roof facing the front of the building and a vertical wall facing the rear. The building was so constructed during the course of the proceedings before the Board on the original appeal. *See revised permit, RE 3, Appendix p.11; RE 31, revised section drawing, App. p. 17; photographs of the project nearing completion, RE 44, App. pp.18-19.* KCA called the Board's attention to the fact that there was no peaked roof in its comments on the Board's draft order, but the Board apparently overlooked this information as well as the relevant portions of the record, in drafting its order.

Secondly, while the fact that the roof structure does not have a peaked or gabled roof is not material to the issue of whether the sixth level is "immediately below the roof," the fact that what the roof covers is a "roof structure" is highly material. That structure is permitted under the 11 DCMR §411.7 of the Zoning Regulations because it is reached by an interior staircase and provides access from the staircase to the roof and roof deck. It therefore has a floor. (*See sheets from project plans showing amount of gross floor areas attributed to the roof structure, RE 31, App. pp.15-16.*) Thus, contrary to the Board's finding, there is no "open area" between the portion of the building's roof that covers the roof structure and the sixth level ceiling beams and collar ties.

Since the definition of "attic" requires that an attic be immediately below the roof, and since the Board's findings to this effect are unsupported by, and in fact contrary to, substantial evidence in the record, for this reason alone the Board erred in concluding that the sixth level was an attic.

2. THE BOARD’S FINDING THAT THE COLLAR TIES ARE A PART OF THE ROOF FRAMING, AND THAT THEREFORE THE SIXTH LEVEL IS WITHIN THE ROOF FRAMING.

Among the Board’s findings of fact was the following:

“7. The collar ties depicted in the plans are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction.”

A. There is no evidence that the collar ties function as part of the roof framing. To justify this finding the Board argues that since it has previously found the collar ties to be structural in character, they “must be part of the structure of some aspect of the building,” and concludes that that aspect is to serve as part of the roof framing. *Order p. 7, App. p. 7.* This strange logic ignores the fact that the function of the collar ties which the Board found to justify characterizing them as “structural” in character was that of bracing the whole building against racking or twisting in a north-south – i.e. front to back – direction, which is altogether different from preventing the roof rafters from spreading.

The Board, however, decides to add a second structural function -- “securing the roof rafters” -- to bracing against north-south racking to the list of structural jobs performed by the collar ties. *Finding of Fact 7, Order p. 4, App. p. 4.* For support of this finding ,it relies solely on the proposition that “[t]he collar ties form the base of the triangle the other two sides of which are the sloping sides of the peaked roof. The Board considers the whole triangle, including its base, to be part of the roof framing.” *Order pp. 5-6, App. pp. 5-6. See also Order p. 7, App. p 7.*

The problem with this reasoning is two-fold: First, as already noted there is no peaked roof covering the roof structure, only a one-sided sloped roof facing the front of the building, interrupted by an enclosed passageway to the roof deck, so the presumed triangle has only two sides. Secondly, even if there were a peaked roof, the “base” of the presumed triangle – the collar

ties – would be separated from the “sides” by several feet – a geometric absurdity – and, being unconnected to the roof rafters that they are said to prevent from spreading, wholly incapable of performing that function.³

More broadly, the developer, Montrose LLC, made no claim that the collar ties “secured the roof rafters” or were connected to any roof rafters in any way or played any role in framing or otherwise supporting the roof, and introduced no evidence to that effect. On the contrary, Montrose’s architect, Norman Smith, was at pains to describe their function as bracing the building against north-south racking, noting that they were affixed to the bearing walls (not the roof rafters), in his ultimately successful effort to convince the Board that the collar ties were necessary structural members. *See Transcript 04 06 04, p. 134, App. p.33*. In fact he was specifically distinguished the function of these collar ties from the characteristic function of collar ties that are, as he said, “sort of banged into the side” of a pair of rafters on opposite sides of a gabled roof and thus prevent them from spreading apart. This is a function that the collar ties could not have performed even for the original gabled roof of the roof structure, being unconnected to and physically separated from them, and certainly do not perform for the revised roof, which has only one set of sloped rafters. *See Transcript 04 06 04 pp.147-48, App. pp. 46-47*.

B. Regardless of the function of the collar ties, the sixth level is not “within the roof framing”, because it is separated from the roof framing by a wallboard ceiling. Even if the collar ties were a part of the roof framing, they would be separated from the sixth level by a gypsum wallboard ceiling and thus the sixth level could not be “wholly or partly within the roof framing”, as required by the definition of “attic”.

³ See Order, Finding of Fact. No. 5: “Collar tie” is defined by *Webster’s Dictionary* as “a board used to prevent the roof framing from spreading or sagging.”

Since the definition of “attic” requires that an attic be wholly or partly within the roof framing, and since the Board’s finding that the collar ties are part of the roof framing is not supported by, and is in fact contrary to, substantial evidence in the record, for this reason alone the Board erred in concluding that the sixth level was an attic.

* * * * *

CONCLUSION

For the foregoing reasons Petitioner respectfully urges the Court to reverse the decision of the Board determining that the sixth level of the subject building is an attic.

Respectfully submitted,

//s//

John Lawrence Hargrove
Counsel for Petitioner
D.C. Bar No. 35413

ADDENDUM: RELEVANT TEXTS OF STATUTES AND REGULATIONS CITED

D.C. Official Code §2-510(a)(3)(A)

§ 2-510. Judicial review

(a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review. . . . The review of all administrative orders and decisions by the Court shall be limited to such issues of law or fact as are subject to review on appeal under applicable statutory law, other than this subchapter. In all other cases the review by the Court of administrative orders and decisions shall be in accordance with the rules of law which define the scope and limitations of review of administrative proceedings. Such rules shall include, but not

be limited to, the power of the Court:

(1) So far as necessary to decision and where presented, to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of any action;

(2) To compel agency action unlawfully withheld or unreasonably delayed; and

(3) To hold unlawful and set aside any action or findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege, or immunity;

(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;

(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or

(E) Unsupported by substantial evidence in the record of the proceedings before the Court.

11 DCMR §199.1

...

Gross floor area – the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of wall separating two (2) buildings. The term “gross floor area” shall not include . . . attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6 in.), or more

...

11 DCMR §199.2(g)

...

(g) Words not defined in this section shall have the meanings given in Webster’s Unabridged Dictionary.

11 DCMR §400.7

...

400.2 Except as provided in §2510, the height of buildings or structures specified in §400.1 may be exceeded as provided in §§ 400.3 through 400.13.

...

400.7 If housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of § 411;

- (b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and
 - (c) It shall not exceed eighteen feet six inches (18 ft., 6 in.) in height above the roof upon which it is located. . . .
- ...

CERTIFICATE OF SERVICE

On this __29th_ day of December, 2011 a copy of the foregoing instrument was sent by United States mail, first class postage prepaid, to:

Richard Love, Esquire
Office of the Attorney General
441 4th Street, N.W., Suite 600 S.
Washington, DC 20001

_____/s/_____
John Lawrence Hargrove

EXHIBIT 3

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

KALORAMA CITIZENS ASSOCIATION,)	
Petitioner)	
v.)	
)	
D.C. BOARD OF ZONING ADJUSTMENT,)	No.11-AA-0851
Respondent)	
)	
)	

Appendix to the Briefs

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1 Board of Zoning Adjustment Order No. 17109-C

Numbered exhibits ("RE") from the record filed with the Court

**Record
number**

11	RE 3 – two revised building permits	
	RE 29 – ; <i>Appellant's Statement</i> ,	
11a	Ex. 9 – excerpt from plans showing “attic” floor plan;	
12	Ex. 10 -- Excerpt from permit application;	
13	Ex. 12 – List of construction abbreviations from plans	
	RE 31 – Motion of Montrose LLC to dismiss, four sheets from project plans attached thereto:	
14	Ex. C -- Section drawing from original plans (also at RE’s 29 and 107)	
15	Ex. C -- Gross floor areas calculations	

- 16 Ex. C -- Floor area ratio (FAR) allocations (also at RE 29)
17 Ex. D -- Revised section drawing (also at RE 29)
18 RE 44 – Two photographs of subject property nearing completion of the project
20 RE 109 – Transmission of Proposed Decision and Order after Remand

2. BZA Transcripts (“Tr,”) from the record filed with the Court

- 30 Tr. 3/16/04, p. 245-47
33 Tr. 4/6/04, pp. 134-148
48 Tr. 07/20/10, pp. 40-43

John Lawrence Hargrove
D.C. Bar #354134
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing instrument on this 5th day of December, 2011 was sent by United States mail, first class postage prepaid, to:

Todd S. Kim, Esquire
Solicitor General
441 4th Street, NW
Suite 600S
Washington, DC 20001

John Lawrence Hargrove

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17109-C of Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permits Nos. B455571 and B455876, dated October 6 and 13, 2003, respectively, to Montrose, LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct an apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C., and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004

DECISION DATES: June 22, 2004, December 7, 2004, and February 1, 2005,
December 6, 2005, July 20, 2010, and April 5, 2011

DECISION AND ORDER AFTER REMAND

Background

On November 10, 2003, the Kalorama Citizens Association (“KCA”) filed this appeal with the Office of Zoning (“OZ”) alleging that Building Permits Nos. B455571, B455876, and B449218, all pertaining to construction at 1819 Belmont Road, N.W. (“subject property”), were issued erroneously by the Department of Consumer and Regulatory Affairs (“DCRA”). The Board of Zoning Adjustment (“BZA” or “Board”) held a properly noticed hearing on the appeal, as well as several decision meetings, and at the final decision meeting on February 1, 2005, decided to partially grant and partially deny the appeal.

The Board’s decision was memorialized in Board Order No. 17109, dated November 8, 2005, which granted the appeal on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act of 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 – 6-601.09 (2001)), but denied the appeal with respect to the penthouse setback requirements under both the Height Act and the Zoning Regulations, and with respect to the floor area ratio (“FAR”) calculations. Order No. 17109-A, dated April 4, 2006, denied KCA’s request for reconsideration of certain aspects of the Board’s decision, including whether a sixth level

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area denoted as “attic” space on the plans would be more properly characterized as a “mezzanine” or “balcony,” thus requiring its inclusion in FAR calculations.

KCA appealed to the District of Columbia Court of Appeals (“Court”) that part of Order No. 17109 which denied its BZA appeal with respect to the FAR calculations. On appeal to the Court, KCA’s arguments as to the FAR issue went to two areas of the FAR calculations. As to the first – whether the basement was properly measured for the purposes of these calculations – the Court upheld the Board’s order. The second issue before the Court was whether the Board had adequately explained its apparent conclusion that the sixth level of the building is an “attic,” making the space potentially not countable towards FAR. The Court found that the Board had not, and remanded the case for the Board to resolve the issue. Because the Zoning Regulations do not contain a definition for the term “attic,” the Court concluded that, pursuant to 11 DCMR § 199.2(g), the Board must determine whether the space falls within one of the three sub-definitions of “attic” set forth in *Webster’s Unabridged Dictionary* (“*Webster’s Dictionary*”).

Because the Court held that the Board did not address the attic issue with sufficient particularity, it also held that the Board had not accorded Advisory Neighborhood Commission (“ANC”) 1C, the ANC within which the subject property is located, the great weight to which it is entitled pursuant to D.C. Official Code § 1-309.10(d) (2001). Therefore, the case was also remanded for the Board to make specific findings with respect to the ANC’s concern that the sixth level does not fall within the definition of “attic” and to explain why the Board does or does not agree with the ANC.

On June 14, 2010, the Board issued a Procedural Order to the parties permitting them to file legal memoranda, based on the record as it existed on the date Order No. 17109 was issued, analyzing the applicability of each of the three sub-definitions of “attic” to the space at issue, and drawing conclusions as to the effect on FAR calculations. The Procedural Order also stated that the Board would not revisit the Board holding that the space provided structural headroom of less than six feet, six inches, which is the second element that must be satisfied for attic space to be excluded from FAR. Finally, the Order indicated that the Board would deliberate on the attic issue at a special public meeting on July 20, 2010.

At the special public meeting on July 20th, the Board deliberated on the attic issue and decided that the space denoted as “attic space” on the original plans submitted with the application is indeed attic space because it falls within the third sub-definition. Since the Board had already concluded that the space provided structural headroom of less than six feet, six inches, the Board reaffirmed its conclusion that the space was properly excluded from the FAR computation and therefore again denied that portion of the appeal.

The Board members participating in this remand did not personally hear the evidence in this case. When that is the case, D.C. Official Code § 2-509(d) (2001) provides that no order adverse

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to a party may be issued until a proposed order has been served upon the parties, who then must given an opportunity to present written exceptions. Therefore, at its public meeting on January 4, 2011, the Board voted to send a proposed order to the parties and established a deadline for any exceptions and responses to be filed. The Appellant timely filed exceptions with the Board on February 4, 2011. (Exhibit 110.) DCRA filed a Response to those exceptions (Exhibit 112), and the Appellant filed a Reply to DCRA's Response (Exhibit 113). Based on its exceptions, the Appellant asked the Board to revise this Order to conclude that the sixth level of the building is not an "attic," but a floor of the building whose square footage must be included in the FAR calculations.

At its public meeting on April 5, 2011, the Board discussed the Appellant's exceptions and voted, 4-0-1, to issue the order as proposed, except for an inclusion of its explanation why it found the exceptions to be unpersuasive. That discussion appears at the end of this Order's Conclusions of Law. The order has also been revised to clarify that its Findings of Facts and Conclusions of Law are based exclusively upon what was in the plans before the Zoning Administrator at the time he cleared the building permit application for zoning review.

This Order, No. 17109-C, reflects the Board's Findings of Fact and Conclusions of Law only on the two issues remanded by the Court – the attic issue and ANC great weight – and incorporates by reference Order No. 17109. This Order, therefore, will not restate all facts concerning the subject property, but only those relevant to the remand issues, and if a relevant factual finding also appeared in Order No. 17109, it is so noted herein.

FINDINGS OF FACT

1. The plans submitted with the application depict a five-story building plus basement, with each story approximately 10 feet high. The plans also depict a sixth level of the building that is six feet, five and one-quarter inches high to the ceiling. (Exhibit 107, Attached Plans.)
2. The plans denote the sixth level as an "attic."
3. The sixth level of the subject building provides less than six feet, six inches of structural headroom. (*See*, Finding of Fact No. 31 in Order No. 17109).
4. The plans show "collar ties" forming part of the unfinished "ceiling" of the building's sixth level which are part of the building's structural members and are placed six feet, five and one-quarter inches above that level's floor.
5. "Collar tie" is defined by *Webster's Dictionary* as "a board used to prevent the roof framing from spreading or sagging."

6. The plans show no finished ceiling to the sixth level because interspersed among the collar ties and ceiling rafters of the sixth level is open space; therefore, there is no full ceiling or floor between the floor of the sixth level and the roof of the building.
7. The collar ties depicted in the plans are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction. (See, Finding of Fact No. 32 in Order No. 17109.)
8. As depicted on the plans, the sixth level of the building is at least partially within the roof framing of the building.
9. Because the plans show no finished ceiling to the sixth level, all of that level would be immediately below the roof of the building. Part of the roof of the building is flat and the sixth level is just below it. Part of the roof of the building is peaked, and there would be an open area between the sixth-level ceiling rafters/collar ties and the peaked roof.

CONCLUSIONS OF LAW

The calculation of “gross floor area” of a building includes only attic space that provides “structural headroom of six feet, six inches (6ft., 6 in.) or more.” (11 DCMR § 199.1, definition of “Gross floor area.”) In Order No. 17109, the Board stated its determination that the sixth level does not provide structural headroom of at least six feet, six inches. (Order No. 17109, at 14.) In that Order, however, the Board failed to specifically find whether the sixth level was an attic. This omission prompted a remand from the Court of Appeals with instructions that the Board determine whether the sixth level fell within one of the three sub-definitions of “attic” in *Webster’s Dictionary*. The Board now holds that the sixth level is an attic, and specifically falls within the third sub-definition.

Section 199.2 of the Zoning Regulations (“Regulations”) directs the Board to *Webster’s Unabridged Dictionary* for words not defined by the Regulations themselves. (11 DCMR § 199.2.) “Attic” is not defined by the Regulations, so the Board turns to the tripartite definition of “attic” in the most current version of *Webster’s Unabridged Dictionary* set out below:

- a. a low story or wall above the main order or orders of a façade in the classical styles;
- b. a room or rooms behind an attic;
- c. the part of a building immediately below the roof and wholly or partly within the roof framing: a garret or storage space under the roof.

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(*Webster's Unabridged Third New International Dictionary*). Sub-definition (b) does not provide any illumination of the question before the Board and is somewhat difficult to interpret as it uses the word being defined in the definition.

Sub-definition (a) is more helpful, and may or may not apply to the sixth level of the subject building. There is some question as to its precise meaning, and as to the nature of a "façade in the classical styles."

Sub-definition (c), however, provides the Board with an understandable, workable definition of "attic" within which the sixth level of the subject building clearly falls. Sub-definition (c) has two parts to it, both of which apply to the sixth level here. First, an attic is "the part of the building immediately below the roof." The sixth level is immediately below the roof. This is evident under the flat-roofed part of the building, where the roof is at the top of the sixth level. It is less clear under the peaked-roof part of the building because immediately above the ceiling rafter/collar ties at the top of the sixth level is an open space that varies in height due to the peak of the roof. (See, Exhibit 107, Attachment 3 (relevant page of plans).)

Under the peaked-roof area, the floor of the sixth level is further from the roof of the building than it is under the flat-roofed area. Under the peak, the sixth level floor is anywhere from approximately eight feet, five and one-quarter inches¹ to 16 feet, five and one-quarter inches² below the roof of the building. There is nothing on the relevant page of the plans that indicates a finished ceiling between the floor of the sixth level and the peaked roof of the building. (Exhibit 107, Attachment 3.) Therefore, the sixth level is not less "immediately below the roof" in the peaked-roof area than in the flat-roofed area, making the whole open area between the sixth level floor and the roof "immediately below the roof," thus satisfying the first part of sub-definition (c).

The second part of sub-definition (c) states that an attic is "wholly or partly within the roof framing." The sixth level of the subject building as shown on the plans includes the collar ties which help stabilize the building. They were not proposed for ornamental purposes, but are structural members of the building's skeleton.³ The collar ties are interspersed with the ceiling rafters of the sixth level, but this "ceiling" is, essentially, unfinished, with open spaces among the rafters and collar ties. The collar ties form the base of the triangle the other two sides of which

¹This number is derived by adding the height of the sixth level -- six foot, five and one-quarter inches -- plus the two feet between the ceiling rafters/collar ties and the low point of the peaked roof.

² This number is derived by adding the height of the sixth level -- six feet, five and one-quarter inches -- plus the 10 feet or so to the top of the peak.

³Board Order No. 17109, at 14, states that "structural" is defined by *Webster's Dictionary* as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

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are the sloping sides of the peaked roof. The Board considers the whole triangle, including its base, to be part of the roof framing. The collar ties are, therefore, structural members which are part of the roof framing, making the sixth level “within the roof framing,” thus satisfying the second part of sub-definition (c).

The third part of sub-definition (c) comes at the end, after a colon, and essentially provides two examples of what the first two parts of the definition try to define. It is not necessary that the sixth level actually fit either category, but in this case it does. The examples given are of “a garret or storage space under the roof.” The sixth level of the subject building is exactly that – a garret or storage space under the roof. A “garret” is defined by *Webster’s Dictionary* as “(1) an unfinished part of a house immediately under or within the roof: loft – compare ATTIC, (2) a room on the top floor of a house.” The sixth level would be an unfinished part of the building just under the roof and within the roof framing, and thus falls within garret definition number one.

ANC 1C filed a submission with the Board on December 2, 2003 (Exhibit 20) supporting the appeal and stating that the sixth level is not an attic under the dictionary definition or any commonly accepted sense of the term. The ANC claimed that the labeling of the sixth level as an attic was a “subterfuge” to avoid counting in FAR calculations space that it claims is intended to be used for human habitation. (Exhibit 20, at 3.) For all of the reasons set forth above, the Board disagrees with the ANC’s position that the sixth level as depicted on the plans is not an attic. The Board instead finds that the proposed sixth level falls within the third sub-definition of “attic” enunciated in *Webster’s Dictionary*. And, as noted by the Court, the issue of habitability is not relevant to whether a space is or is not an attic.⁴

Discussion of Exceptions

The Appellant took exception to several of the Findings of Fact and Conclusions of Law set forth in the then Proposed (now Final) Order. (Exhibit 110.) The Appellant claimed that Finding of Fact No. 6 and the first sentence of Finding No. 9 were not based on substantial evidence in the record. Taken together, Finding No. 6 and the first sentence of No. 9 discuss the absence of a finished ceiling to the sixth level, and find that, due to the lack of such a finished ceiling, all of the sixth level is “immediately below the roof of the building.” The Appellant’s exception states that the Board, in the final analysis, failed to rely on what was shown on the plans, and instead, based its decision on whether the sixth level had a finished ceiling either during construction, or, alternatively, after construction of the building was complete. The Appellant states that “[i]t is axiomatic that what controls in such a dispute are the plans for the completed project as permitted, not the physical configuration of the project at various stages of completion.” (Exhibit 110, at 3.)

⁴*Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment*, 934 A.2d at 407 (D.C. 2007).

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The Board agrees with the Appellant in principal, but disagrees in substance. The Board agreed that its principal focus should be on the plans before the Zoning Administrator at the time the building permit was being reviewed for zoning compliance. In fact the plans do not authorize a finished ceiling between the floor of the sixth level and the building's roof.

Looking at the relevant sheet of the originally-submitted plans, attached to Exhibit 107, there is no indication that a finished ceiling was to be installed above the sixth level of the building. Since a building may only be constructed in accordance with the plans approved by DCRA, this Board can only conclude that the building permit did not authorize the construction of a finished ceiling at this level. The Appellant cites the testimony of the developer's representative as to whether there exists a finished ceiling to the sixth level, but, as conceded by the Appellant, this testimony is not controlling as to the issue. (Exhibit 110, at 2.) What is controlling are the plans, and the Board does not read the plans to show a finished ceiling. All that a constructed ceiling would prove is unlawful construction, which is an enforcement issue not before the Board.

The Appellant's next exception alleges that Findings of Fact Nos. 7 and 8 are not supported by substantial evidence, claiming that there is no support for the findings that either the collar ties or the sixth level are at least partially within the roof framing. The Board has already found that the collar ties are structural members of the building and this finding was not at issue in the remand. The collar ties, as part of the structure of the building, and not merely ornamental, must be part of the structure of some aspect of the building, and, in fact, they are part of the roof framing. They are not found distributed throughout the building, but only at the top of the sixth level, under the flat roof and forming the base of the triangle made by the peaked roof. The whole triangle, including its base, are part of the roof framing; therefore, the Board maintains its finding that the collar ties and the sixth level are at least partially within the roof framing.

The Appellant last takes exception with the Board's conclusion that the sixth level is a "garret." This exception relies on the Appellant's three earlier conclusions that the sixth level is not immediately under the roof, but under its own ceiling, that it is not within the roof framing, and that its ceiling is finished. But the Board disagrees with all of these conclusions. *Webster's Dictionary* definition of "attic" uses the word "garret" as an example of what is defined, essentially as a synonym for "attic." The definition of "garret" itself is "an unfinished part of a house immediately under or within the roof." (See, definitions set forth below.) The Board reiterates that the sixth level is an unfinished part of the building immediately under the roof, and so qualifies as a garret. But, in any event, it is not necessary that the sixth level actually be a garret, as long as it falls within one of the three sub-definitions of "attic."

Lastly, contrary to the Appellant's implication (Exhibit 110, at 5-6), any evidence of habitability is not relevant to the Board's determination that the sixth level is an attic. *Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 407 (D.C. 2007).

CONCLUSIONS

On remand the Board concludes that the sixth level of the subject building is an attic. Having already concluded that the space has less than six feet, six inches of structural headroom, the area was properly excluded by the Zoning Administrator from the calculation of the gross floor area of the building. Therefore, the building does not exceed the maximum floor area ratio permitted in this R-5-D Zone District. Accordingly, the Board affirms its denial of Appeal No. 17109 with respect to the FAR calculations.

VOTE TO AFFIRM REMANDED PORTION OF APPEAL:


3-0-2 (Meridith H. Moldenhauer, Konrad W. Schlater, and Shane L. Dettman to affirm.
No other Board members participating)

VOTE TO ISSUE AN ORDER ADVERSE TO A PARTY:

4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Konrad W. Schlater to issue; No other Board member (vacant) participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this Order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 15 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA ORDER NO. 17109-C / APPEAL NO. 17109

As Director of the Office of Zoning, I hereby certify and attest that on JUN 15 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Kalorama Citizens Association
c/o Anne Hughes Hargrove
1827 Belmont Road, N.W.
Washington, D.C. 20009

Montrose, LLC
c/o Mary Carolyn Brown, Esq.
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006-6801

Andrea Ferster
1100 17th Street, N.W., 10th Floor
Washington, D.C. 20036

Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21009
Washington, D.C. 20009

Single Member District Commissioner 1C
Advisory Neighborhood Commission 1C03
P.O. Box 21009
Washington, D.C. 20009

Matthew LeGrant, Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Room 3100
Washington, D.C. 20024

441 4th Street, N.W., Suite 200/210-S. Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

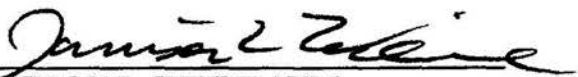
BZA ORDER NO. 17109-C / APPEAL NO. 17109
PAGE NO. 2

Councilmember Jim Graham
Ward 1
1350 Pennsylvania Avenue, N.W., Suite 105
Washington, D.C. 20004

Harriet Tregoning, Director
Office of Planning
1100 4th Street, S.W., Suite E650
Washington, D.C. 20024

Melinda Bolling, Esquire
Acting General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

*Attachment 2 to Appeal of Kalorama Citizens Association
to the Board of Zoning Adjustment regarding 1819 Belmont Road, N.W.*

Permits B455571 and B455873

**P
E
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M
I
T**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION**

BUILDING PERMIT

PERMIT NO. B455571

Date **10/6/03** (Type) **MISC.** *ck*
Address of work **1819 BELMONT RD NW**
Permission is hereby granted to

Lot **0045** Square **5** **2551**

TOTAL PERMIT FEE \$
FILING FEE \$

to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

(Owner) NO.

DATE
FEE PAYABLE \$ **32.00**

Authorized work and conditions of performance thereof:

FOR INSPECTIONS CALL **727-2222**

NEW REVISIONS TO PERMIT B449218 TO ADJUST BUILDING HEIGHT TO 70'-0" CLASSIFICATION CALCULATIONS AS PER ATTACHED DRAWINGS.

Builder—
Width of Bldgs. Length Height
Zone **R5D**
Height of terrace above grade
Address of owner **2311 15TH ST NW**
Deposit No. Amount \$
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Value \$ No. of Bldgs.
No. of Stories **5 + B**

To be occupied as **APARTMENT HOUSE**
Projections:

By *[Signature]* Chief, Permit Issuance
Permit Clerk

D. CLARK **32301**
DIRECTOR

0001 D.C. GOVERNMENT
 10/06/03 at 12:52 CLK# 11
 037853 Amount *****33.00
 1215 BUILDING STRUCTURE & EQUI

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION**

BUILDING PERMIT

PERMIT NO. B455873

Date **10/16/03** (Type) **MISC.** *ck*
Address of work **1819 BELMONT RD NW**
Permission is hereby granted to

Lot **0045** Square **2551**

TOTAL PERMIT FEE \$
FILING FEE \$

to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

(Owner) NO.

DATE
FEE PAYABLE \$ **60.00**

Authorized work and conditions of performance thereof:

FOR INSPECTIONS CALL **727-2222**

NEW REVISIONS TO PERMIT B455571 TO REVISE PENTHOUSE ROOF STRUCTURE PER REQUEST PER ATTACHED DRAWINGS.

Builder—
Width of Bldgs. Length Height
Zone **R-5-D**
Height of terrace above grade
Address of owner **2311 15TH ST NW**
Deposit No. Amount \$
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Value \$ No. of Bldgs.
No. of Stories **5 + B**

To be occupied as **APARTMENT HOUSE**
Projections:

By *[Signature]* Chief, Permit Issuance
Permit Clerk

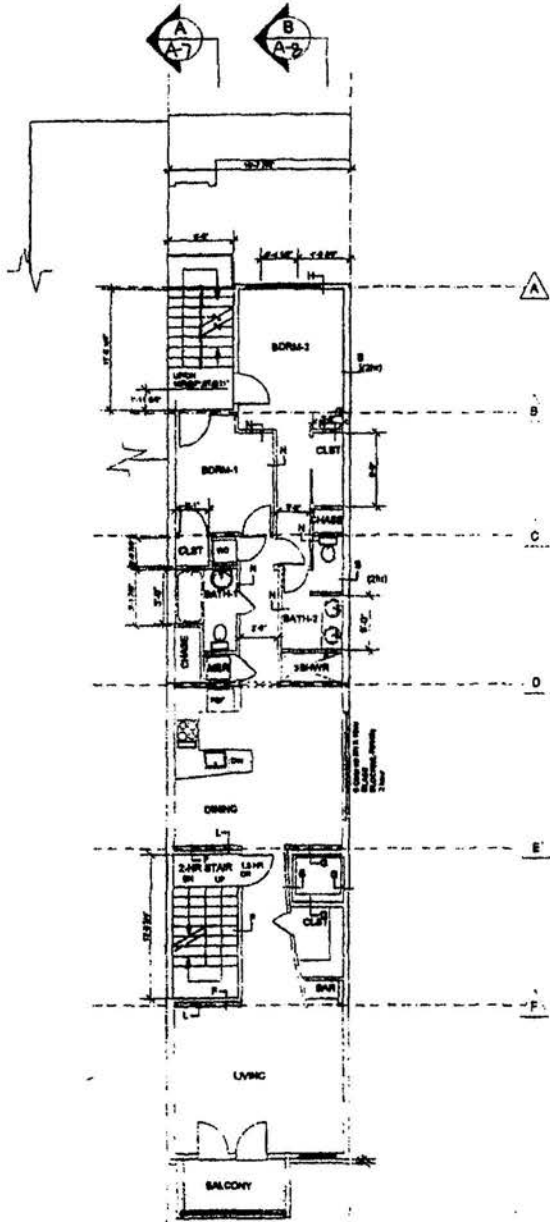
D. CLARK **32301**
DIRECTOR

0001 D.C. GOVERNMENT
 10/16/03 at 12:29 CLK# 11
 040062 Amount *****60.00
 1215 BUILDING STRUCTURE & EQUI

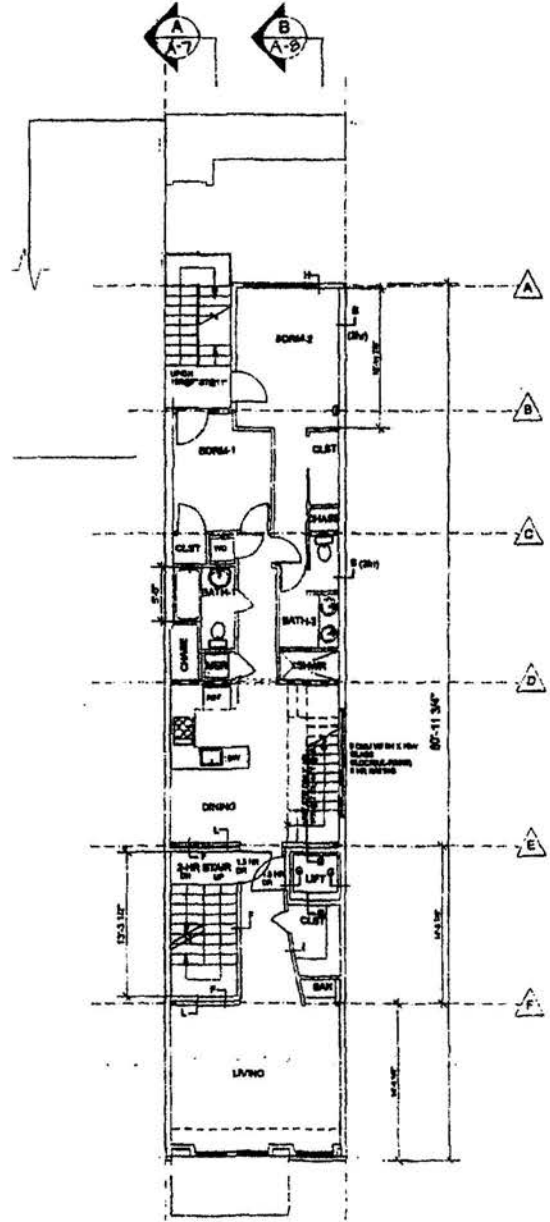
17109
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8.

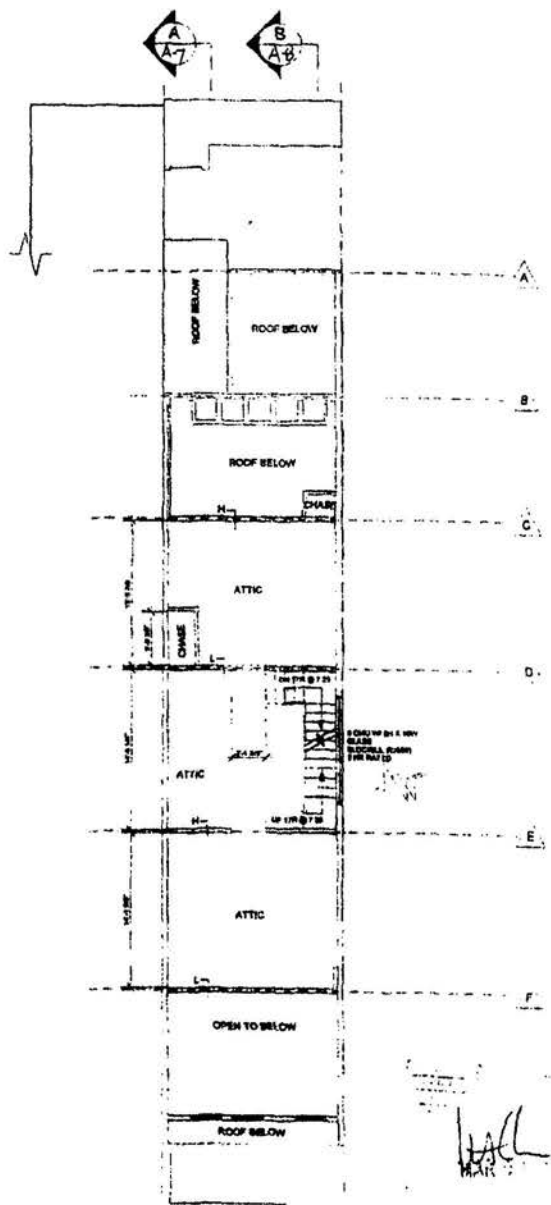
11a



FOURTH FLOOR PLAN
Scale: 1/8" = 1'-0"



FIFTH FLOOR PLAN
Scale: 1/8" = 1'-0"



ATTIC PLAN
Scale: 1/8" = 1'-0"



NORMAN SMITH ARCHITECTURE
 1819 Belmont Rd. NW
 Washington, D.C. 20009
 PERMIT 12-19-02
 A 4

DATE: 02/05/03

TO: ROBERT CHEN @ STRUCTURAL, RAVI SHANKAR @ MECK/PLUMB, FIRE REVIEWER
(NO NAME PROVIDED)

FROM: NORMAN SMITH ARCHITECTURE

RE: RESPONSES TO YOUR PLAN CORRECTION LIST DATED 02/03/03 FOR JOB
FILE # 314-B; 1819 BELMONT ST., N.W.

RESPONSES TO STRUCTURAL. LISTED BY YOUR NUMBERS:

1. DC SURVEYOR'S PLAT(S) WERE PROVIDED WITH ORIGINAL APPLICATION;
REPLACEMENT COPIES WERE PROVIDED ON 02/03/03.
2. CLARIFY SPRINKLER: YOUR COMMENT IS UNCLEAR: THE SPRINKLER RISER IS NOTED
ON PAGE SP/FP-1. ALL LEVELS OF THE BUILDING (INCLUDING BASEMENT, FIRST,
SECOND, THIRD FOURTH, FIFTH, ATTIC AND STAIR AREA TO PRIVATE ROOF DECK ARE
SERVED BY SPRINKLER RISER (SP ON THE DRAWINGS); INDIVIDUAL HEAD LOCATIONS
AND SPRINKLER PIPE DRAWINGS WILL BE PROVIDED, AS USUAL, WITH THE FIRE
PROTECTION/SPRINKLER SUBCONTRACTOR'S SHOP DRAWING SUBMITTAL TO DC.
3. CLARIFY NO. OF STORIES: THE BUILDING IS FIVE STORIES WITH ATTIC SPACE; THE
BASEMENT IS NOT A STORY ABOVE GRADE UNDER BOCA DEFINITION FOR STORY
ABOVE GRADE, 502.1 (DEFINITION OF STORY ABOVE GRADE, ITEM #2); THE ATTIC IS
THE SPACE BETWEEN THE CEILING BEAMS AND THE RAFTERS PER BOCA DEFINITION
FOR ATTIC, 1202.1 (DEFINITION OF ATTIC). ALTHOUGH THE BASEMENT IS NOT A
STORY BY DEFINITION, BOCA SECTION 504.6 ALLOWS 6 STORIES (1 MORE THAN
SHOWN) WHEN THE BASEMENT IS SEPARATED BY THE 3-HOUR ASSEMBLY NOTED IN
THE DRAWINGS AND IN THE BUILDING CODE NOTES ON PAGE A-1.
4. NO OPENING W/IN 3 FT; THE GLASS BLOCK ASSEMBLY NOTED IS NOT AN OPENING IN
THE WALL BUT IS A U.L. RATED 2-HOUR ASSEMBLY WHICH IS INOPERABLE AND IS A
WALL ASSEMBLY AND MAINTAINS THE 2-HOUR WALL RATING. HOWEVER, FOR COST
REASONS, THAT ASSEMBLY WILL BE DELETED FROM THE DRAWINGS WHICH WILL
RESOLVE THIS ISSUE.
5. PROVIDE STL CERTIFCN; THE STRUCTURAL ENGINEER, AHMET OZUSTA, WILL
PROVIDE THE REQUESTED LETTER.

RESPONSES TO FIRE

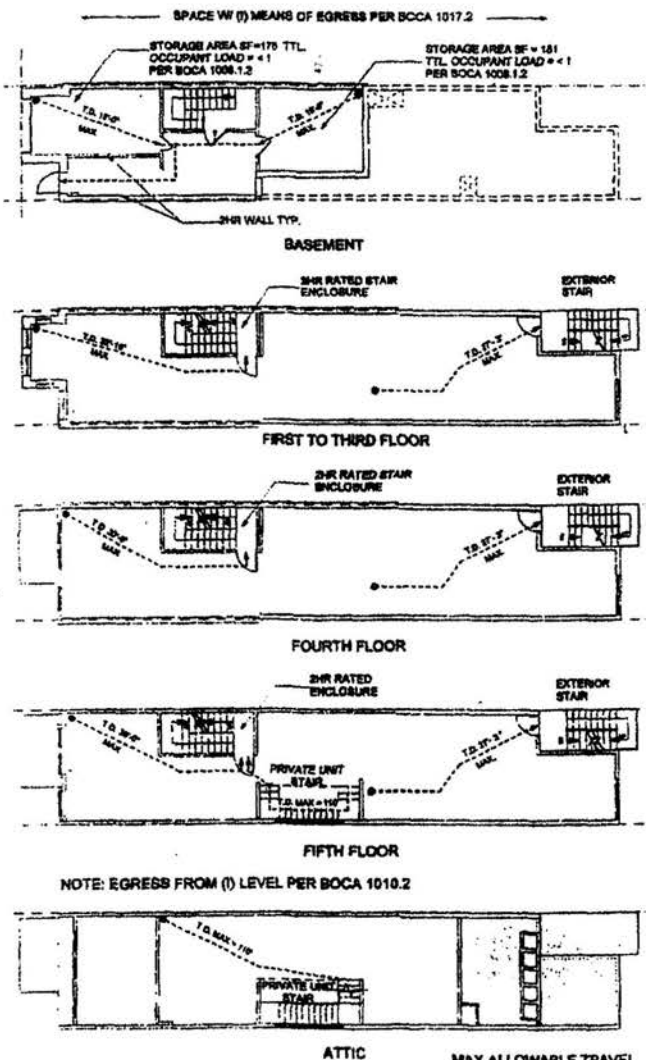
1. THE INCOMING WATER SUPPLY AND SIZING IS INDICATED ON THE WATER/SPRINKLER
RISER ON PAGE SP/FP-1.
2. RE THE ABBREVIATIONS; FS = FLOW SWITCH, BFP = BACK-FLOW PREVENTOR, FDC =
FIRE DEPARTMENT CONNECTION. THE LEGEND IS NOTED ON PAGE P-2; A COPY OF
LEGEND WILL BE PROVIDED.

RESPONSES TO MECH/PLUMB

1. APPROVAL FROM WASA/BRYANT ST FOR WATER/SEWER AVAILABILITY WILL BE
PROVIDED.
2. ELEVATOR (PRIVATE LIFT) REVIEW HAS BEEN APPROVED ON CONTROL BATCH SHEET
SO THIS ISSUE IS RESOLVED.
3. DOH(DEPARTMENT OF HEALTH) DOES NOT HAVE PURVIEW OVER A 5 UNIT
RESIDENTIAL CONDOMINIUM SO NO APPROVAL IS REQUIRED.
4. WATER RISER; THE WATER SUPPLY LINES ARE INDICATED IN PLAN WITH THE MAIN
WATER RISER INDICATED ON THE WATER/SPRINKLER RISER ON PAGE P-2.
ALTHOUGH WE HAVE NOT BEEN REQUIRED TO PROVIDE A COMPLETE WATER RISER
DIAGRAM IN THE PAST FOR SIMILAR SIZE PROJECTS, WE WILL PROVIDE THIS.

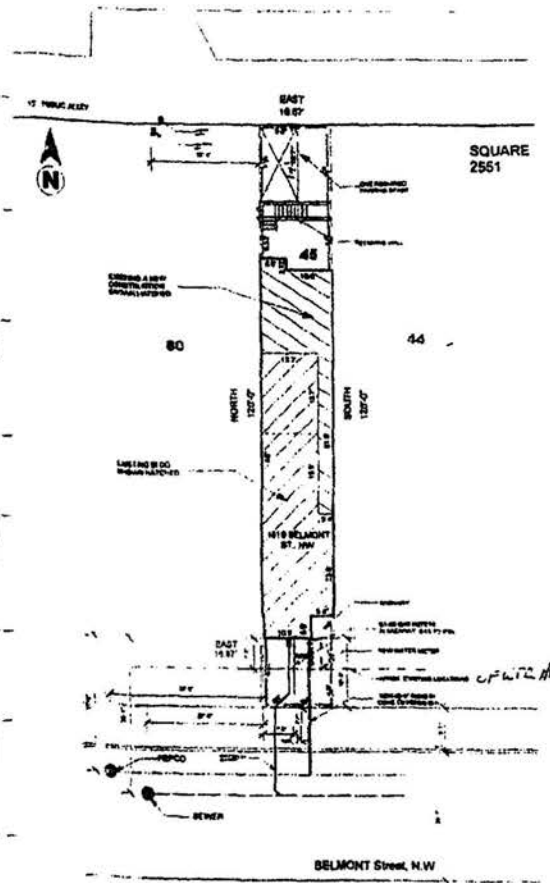
ABBREVIATIONS

ABOVE FINISHED FLOOR	AF	INTERIOR	INT
ABSTRACTIC JOINT	AJ	JOINT	JT
ANCHOR BOLT	AB	LAG SCREW	LS
APPROXIMATE	APPR	LOAD BEARING	LB
BENCHMARK	BM	MASONRY	MAS
BUILDING	BLD	MAJUMUM	MAJ
BLOCK/BLOCKING	BLK/BLKO	MEMBER	MR
		MOISTURE RESISTANT	MTL
BUILT-ON	BL	METAL	MSE
BEAD	BD	MODIFIED BITUMENE SYSTEM	MFI
BULKHEAD	BLKHD	MAN HOLE	MLB
BOLT	BO	NON-LOAD BEARING	MIC
BOTTOM	BTM	NOT IN CONTRACT	OSB
CEILING	CLG	CEREBATED FIBERGLASS BOARD	OFDI
CEMENT SLURRY BOARD	CS SB	OWNER FURNISHED AND OWNER	OFCI
CENTER(S)	CTRS/CNTR(S)	INSTALLED	OFCT
CLEAR	CLR	OWNER FURNISHED AND CONTRACTOR	PERP
CONCRETE MASONRY UNIT	CMU	INSTALLED	
COMPACTED	COMP	PERFORATED/PERFORATED	
COMBINED SANITARY AND R/W	CS OR CROR	PLATE	
CORNER	CRN OR CROR	PLYWOOD	
COLUMN	COLM	PAINTED	
CONTROL JOINT	CJ	PRESSURE TREATED	
CONCRETE	CONC	POLYETHYLENE	
COURSER(S)	CRS	PATCH TO MATCH	
COLLAR TIE	CT	RAIN WATER LEADER	
DRAINAGE/WASTE/VENT	DWPV	SCHEDULE	
DEPT/PUBLIC WORKS	DPW	SERVICE ENTRANCE	
DIAMETER	DM	SOLDERED FLAT SEAM	
DISCHARGE	DSCH	SPRINKLER	
DOUBLE	DBL	FLASH BLOCK	
DOOR(S)	DR(S)	STEEL	
(DUN, N/S/P/U)	DS	STORM	
DRAIN TILE	DT	SUBFLOOR	
EACH WAY	EW	SEALS/SZLS/YES	
EQUAL	EQ	SHOWER	
ELECTRICAL PANEL	EP	STAGGERED	
EXPANSION	EXP	STANDARD SEAM	
EXISTING	EXIST	STRUCTURAL	
EXTERIOR	EXT/EXTR	SURFACED 4 SIDES	
EXTRA STRONG	ES	TO BE DECIDED	
FINISH FLOOR	FF	TONGUE AND GROOVE	
FRESH	FR	TO BE SELECTED	
FACE OF FRAMING	FFR	TUBE STEEL	
FOUNDATION	FFND	TYP	
FIBERGLASS	FG	TELEPHONE	
FLOOR	FLR	(UNLESS OTHERWISE NOTED)	
FACE OF MASONRY	FOM	VAPOR BARRIER	
FOUR SIDES	FS	VERIFY IN FIELD	
(TYPICAL) DRYWALL	DFW	WELDED WIRE MESH/ABRC	
HEADER	HDR	WOOD	
(E, L/S, L/T, A/B)	HD	WATER	
W/L/D	HIT	WATER PROOF/FLOORED	
HEIGHT	HSUL		
INSULATE/INSULATION			



EGRESS PLAN
NON SCALE

MAX ALLOWABLE TRAVEL DISTANCE = 250' PER 1996 BOCA 1006.5



SITE PLAN
Scale: 1" = 20'

DISTRICT OF COLUMBIA
PERMITTING DIVISION
STRUCTURAL WORK IN GENERAL
APPROVED SUBJECT TO THE
TERMS AND CONDITIONS OF THE PERMIT

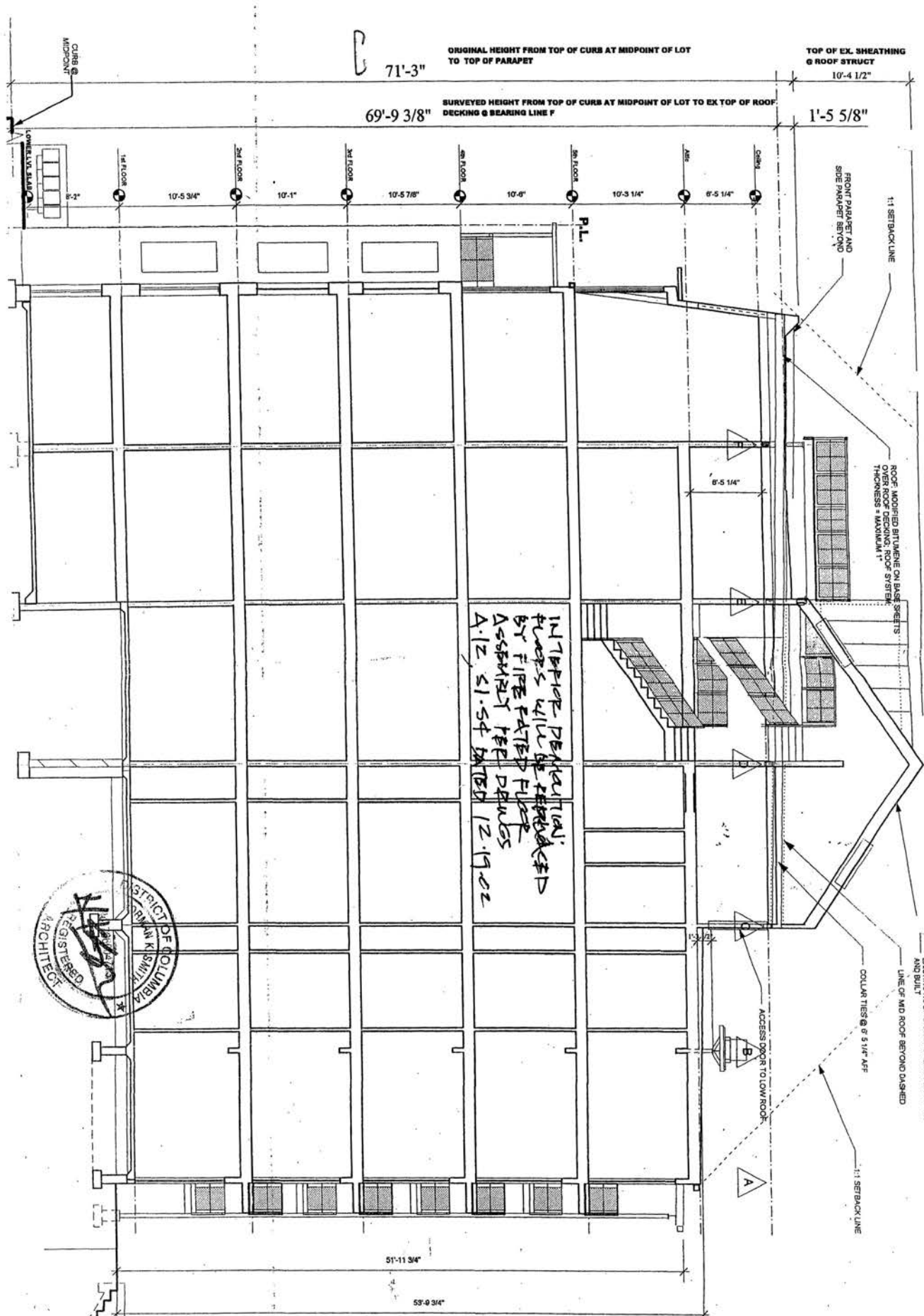
Plan No. *101*
Date **MAR 08 2003**



NORRIS SMITH ARCHITECTURE
 2311 15th St., N.W., Washington, DC 20007
 (202) 462-1100
 Fax: (202) 462-1101
 PERMIT 12-19-02
 Design: NORRIS SMITH ARCHITECTURE

1819 Belmont RD, NW
 Washington, DC 20009

A2



ORIGINAL HEIGHT FROM TOP OF CURB AT MIDPOINT OF LOT TO TOP OF PARAPET

71'-3"

TOP OF EXL SHEATHING TO ROOF STRUCT

10'-4 1/2"

SURVEYED HEIGHT FROM TOP OF CURB AT MIDPOINT OF LOT TO EX TOP OF ROOF DECKING @ BEARING LINE F

69'-9 3/8"

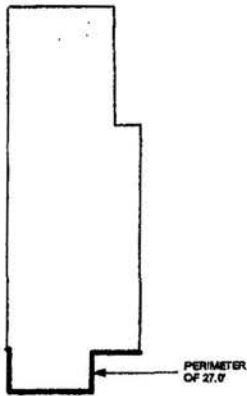
1'-5 5/8"

IN TOP OF PENULTIMATE FLOOR WILL BE REBACKED BY FIRE RATED FLOOR ASSEMBLY PER DWGS A-12, S1-54 DATED 12.19.02



1819 BELMONT RD., NW 09-29-03
 NORMAN SMITH ARCHITECTURE 202.462.5886

SECTION SHOWING AS BUILT AND
 ORIGINALLY PERMITTED ROOF

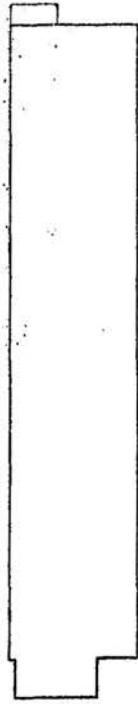


LOWER LEVEL FAR CALCULATION:
 TOTAL AREA = 736.6 SF TOTAL
 PERIMETER = 131.4 LF

PERIMETER WITH CEILING WHICH IS >4' ABOVE ADJACENT FINISHED GRADE = 27.0 LF

FAR = $131.4 / 27.0 \times 736.6 = 147.3$ FAR SF

STAIR LANDING PROJECTION @ 1,2,3; 15.4 FAR SF X 3 = 46.2 FAR SF



FLOORS 1,2,3 FAR CALCULATION:

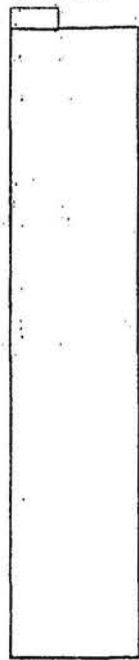
1,2,3; 1394.1 FAR SF X 3 = 4182.3 FAR SF.

1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR AT EACH FLOOR
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

STAIR LANDING PROJECTION @ 1,2,3; 15.4 FAR SF X 3 = 46.2 FAR SF

TOTAL FAR = 4228.5 FAR SF

STAIR LANDING PROJECTION @ 4; 15.4 FAR SF X 1 = 15.4 FAR SF



FLOOR 4 FAR CALCULATION:

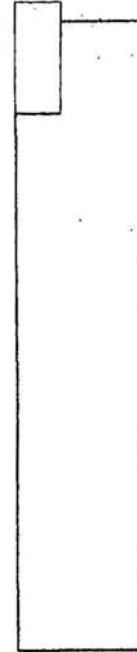
1336.6 FAR SF X 1 = 1336.6 FAR SF.

1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR AT EACH FLOOR
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

STAIR LANDING PROJECTION @ 4; 15.4 FAR SF X 1 = 15.4 FAR SF

TOTAL FAR = 1352.0 FAR SF

STAIR BMS COUNTED ON FLOORS BELOW. ROOF ONLY @ 0; NO FAR SF



FLOOR 5 FAR CALCULATION:

1270.5 FAR SF X 1 = 1270.5 FAR SF.

1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR OF FLOORS BELOW; NO FAR AT THIS LEVEL
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

TOTAL FAR = 1270.5 FAR SF

TOTAL AREA OF ROOF STRUCTURE INCLUDING STAIR AND OPEN AREAS WITHOUT LANDING OR STAIRS; 260.7 SF



AREA OF ROOF STRUCTURE WITH LANDING AND STAIR THAT COUNTS TOWARD FAR SF; 124.3 FAR SF



ROOF STRUCTURE FAR CALCULATION:

TOTAL SF OF ROOF STRUCTURE INCLUDING STAIR LANDING AND OPEN AREAS WITHOUT FLOORS = 260.7 SF

AREA OF ROOF STRUCTURE WITH LANDING AND STAIR THAT COUNTS TOWARD FAR SF = 124.3 FAR SF

TOTAL FAR = 124.3 FAR SF



1919 BELMONT RD., NW 09-29-03
 NORMAN SMITH ARCHITECTURE
 202.462.5886

FAR GRAPHICS

ZONING INFORMATION; REVISED 09-29-03

1 STREET ADDRESS: 1819 BELMONT STREET, N.W. WASHINGTON, DC
 2 LOT: 45
 3 SQUARE: 2551
 4 ZONING: R5D
 5 NUMBER OF DWELLING UNITS: 5
 6 MINIMUM LOT SIZE: NONE PRESCRIBED
 7 LOT SIZE: 2000.4 SF
 8 FAR: SEE ATTACHED GRAPHIC

8.1 ALLOWABLE/REQUIRED;
 8.1.1 MAIN: 3.5 MAIN: 2000.4 SF X 3.5 = 7001.4 SF
 8.1.2 ROOF STRUCTURE: .37 OF FAR OF FLOOR BELOW: .37 X 1270.5 = 470.1
 8.1.3 TOTAL ALLOWABLE: 7471.4 SF

8.2 ACTUAL
 8.2.1 CELLAR: (20% OF GFA CEILING HEIGHT AT LESS THAN 4' ABOVE GRADE, BASED ON PERIMETER CALCULATION)
 736.6 X.20 = 147.3 SF

8.2.2	1 ST ,	
	8.2.2.1 MAIN:	1394.1 SF
	8.2.2.2 STAIR LANDING	15.4 SF
8.2.3	2 ND ,	
	8.2.3.1 MAIN:	1394.1 SF
	8.2.3.2 STAIR LANDING	15.4 SF
8.2.4	3 RD ,	
	8.2.4.1 MAIN:	1394.1 SF
	8.2.4.2 STAIR LANDING	15.4 SF
8.2.5	4 TH ,	
	8.2.5.1 MAIN:	1336.6 SF
	8.2.5.2 STAIR LANDING	15.4 SF
8.2.6	5 TH ,	
	8.2.6.1 MAIN:	1270.5 SF
	8.2.6.2 STAIR LANDING: NONE	0 SF
8.2.7	ATTIC; NOT APPLICABLE	0 SF
8.2.8	ROOF STRUCTURE	124.3 SF
8.2.9	TOTAL	7122.6 SF

8.2.10 NOTES:
 8.2.10.1 CALCULATION BASED ON LOT LINE TO LOT LINE AND INCLUDING EXTERIOR WALLS
 8.2.10.2 CHASE SPACES INCLUDED IN FAR FOR EACH FLOOR
 8.2.10.3 REAR STAIRS INCLUDED AS SEPARATE LINE ITEM AT FLOORS 1-4 (I.E. STAIR RUN FROM FLOOR 1 TO FLOOR 2 IS COUNTED AS FAR ON FLOOR 1); STAIR RUN TO GRADE IS BELOW MAIN LEVEL OF 1ST FLOOR AND DOES NOT COUNT TOWARD FAR; THERE IS NO STAIR ABOVE FLOOR 5
 8.2.10.4 3'-0" DEEP REAR BALCONIES DO NOT COUNT TOWARD FAR
 8.2.10.5 ROOF STRUCTURE FAR IS BASED ON THE STAIR, LANDING AND HORIZONTAL SURFACES WITHIN THE ROOF STRUCTURE
 8.2.10.5.1 TOTAL AREA OF ROOF STRUCTURE, INCLUDING OPEN AREAS = 260.7 SF, RESULTING IN TOTAL OF 7259 SF < 7471.4 ALLOWABLE

9 LOT COVERAGE:
 9.1 ALLOWABLE/REQUIRED; 75%; 2001.4 X .75 = 1500.3 SF
 9.2 ACTUAL 1409.3 SF

10 REAR YARD
 10.1 ALLOWABLE/REQUIRED: 4" PER 12" VERTICAL HEIGHT(.33) AT MIDPOINT REAR GRADE, 15'-0" MIN.; BUILDING HEIGHT AT REAR = 53'9 1/4" X .33 = 17'9 1/8"
 10.2 ACTUAL AT NEW WORK: 31' 2 1/4"

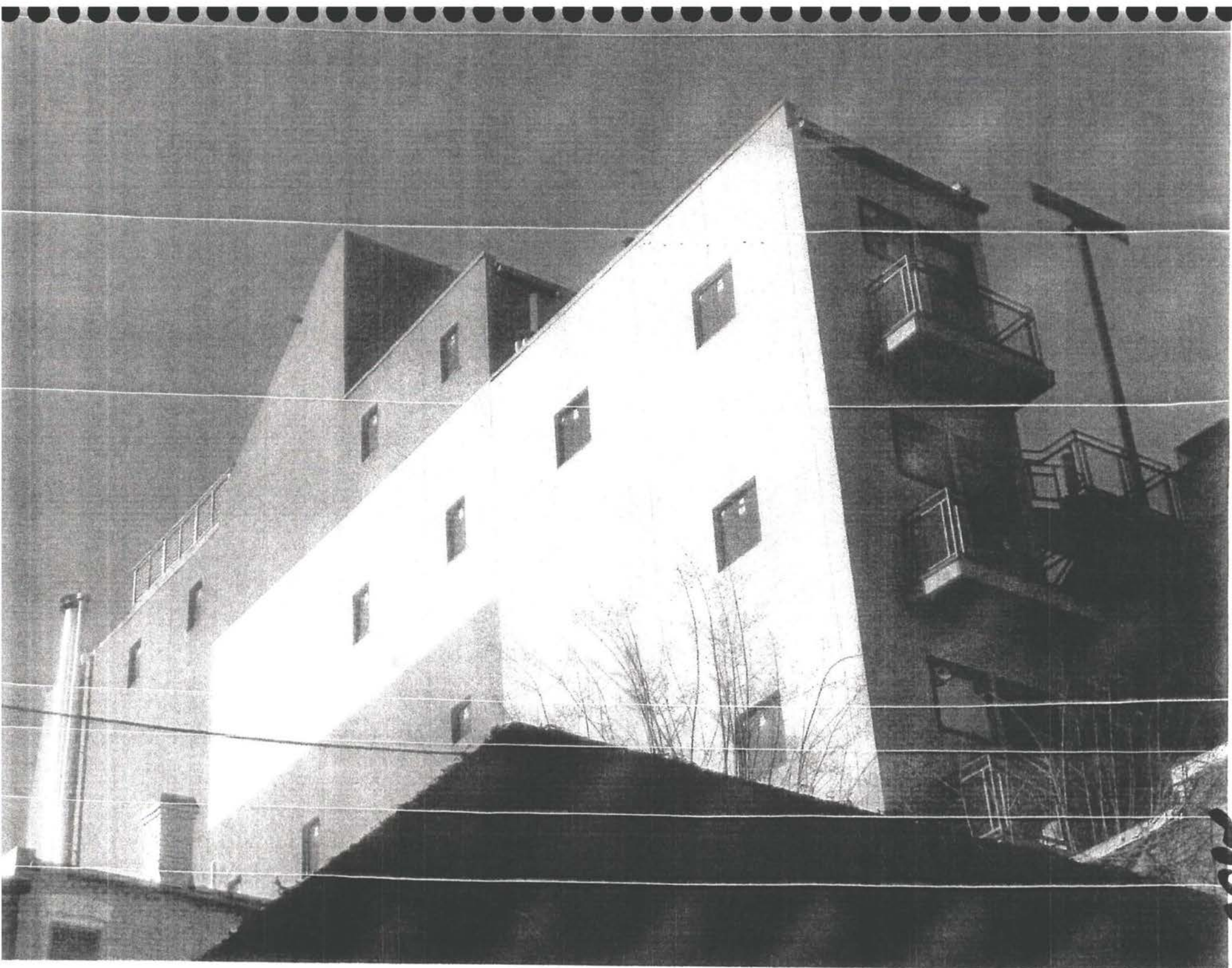
11 SIDE YARDS: NOT APPLICABLE
 12 COURTS: NOT APPLICABLE
 13 BUILDING HEIGHT
 13.1 ALLOWABLE: 90.0' UNDER R5-D
 13.1.1 UNDER 1910 HEIGHT ACT, FOR STREET WIDTH OF 80.0', BUILDING HEIGHT IS LIMITED TO 70.0'
 13.2 ACTUAL AS REVISED: 70.0'

14 NUMBER OF STORIES
 14.1 ALLOWABLE: NO LIMIT
 14.2 ACTUAL: 5

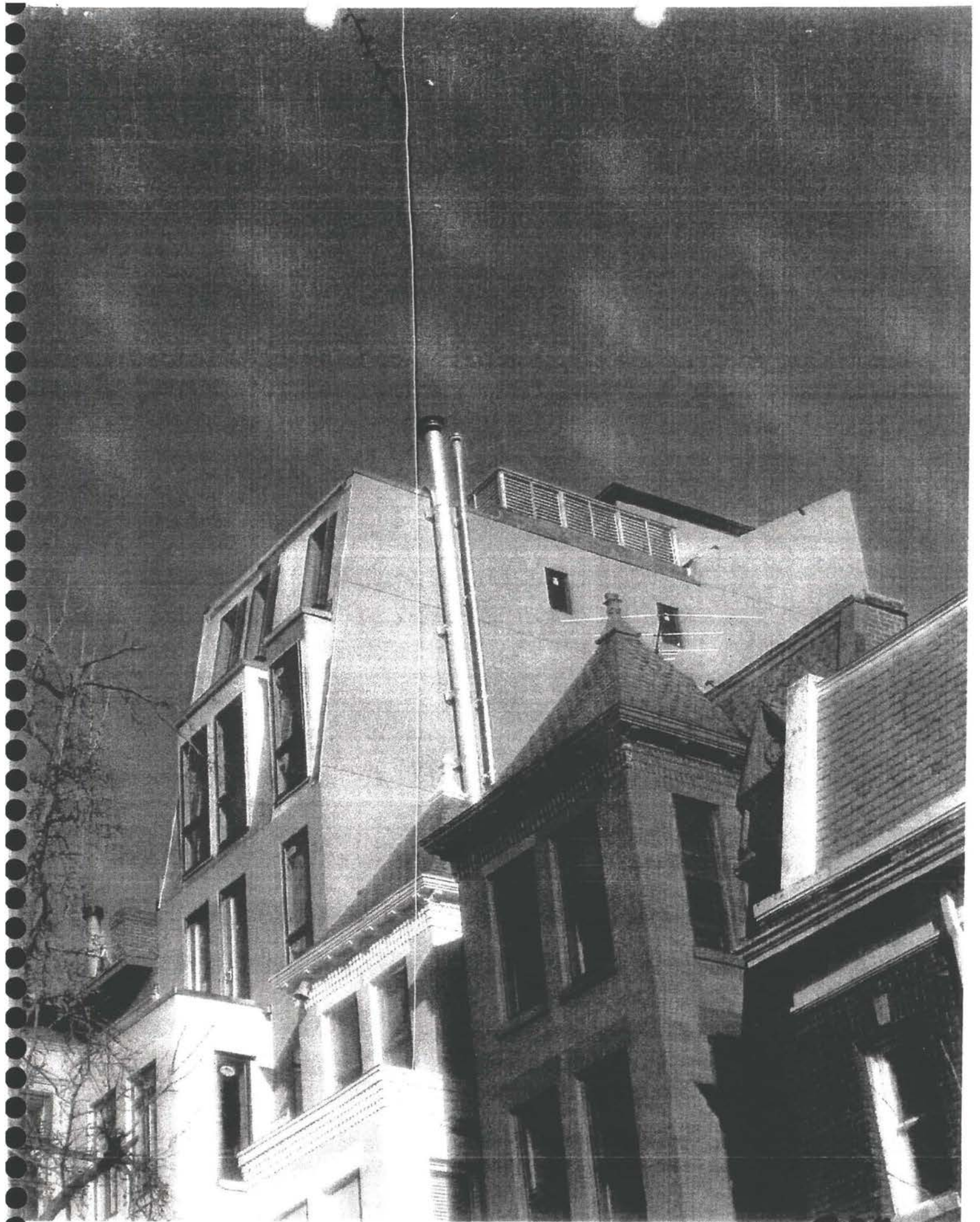
15 USE GROUP UNDER BLDG CODE
 15.1 EXISTING: R-2; 4 UNITS
 15.2 NEW: R-2; 5 UNITS (20% INCREASE IN USE INTENSITY)

16 PARKING
 16.1 REQUIRED: (1) REQUIRED UNDER DCMR 11, #2100.7 FOR 5 UNITS (20% INCREASE IN USE INTENSITY).
 16.2 PROVIDED: 1 SPACE PROVIDED; AUXILIARY PARKING SPACES WHICH MAY BE PROVIDED; 2





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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



January 7, 2011

To the Parties in Appeal No. 17109-C:

This letter is being sent to you on behalf of the Board of Zoning Adjustment (“Board” or “BZA”) because you were a party to Appeal No. 17109 of Kalorama Citizens Association (and remain a party in the remanded portion of that appeal). The Board partially granted and partially denied the appeal on February 1, 2005. One of the portions of the appeal that was denied concerned an allegation that the sixth level of the subject building was an attic and therefore improperly excluded from the computation of its floor area ratio. The Board Order memorializing this decision was appealed to the District of Columbia Court of Appeals (“Court”).

The Court concluded that “remand [was] required so that the BZA may consider the attic issue in light of the definitions incorporated by reference in the zoning regulations, and so that it can explain why it was or was not appropriate for the Zoning Administrator to treat the sixth level as an attic.” *Kalorama Citizens Ass’n. v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 406 (D.C. 2007). The Court further instructed the Board that it “must articulate in writing specific findings and conclusions with respect to the ANC’s concern that the sixth level does not fall within the Webster’s dictionary definition of ‘attic’ and, if the BZA disagrees with the ANC’s position, must explain in writing why it does not find the ANC’s position persuasive.” 934 A.2d at 407.

At its special public meeting held on July 20, 2010, the Board decided that the sixth level space fell within one of the sub-definitions of “attic.” Because the Board had already concluded that the space provided less than six feet, six inches of structural headroom, it found that the Zoning Administrator appropriately excluded the area from his computation of floor area ratio and once again voted to deny this portion of the appeal.

None of the Board members who participated in the July 20th deliberations had personally heard the evidence presented in the hearing on Appeal No. 17109. Section 10 of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-509(d) (2001), states that whenever the majority of those who will render a final decision in a contested case did not personally hear the evidence, “no order or decision adverse to a party to the case . . . shall be made until a proposed order or decision, including findings of fact and conclusions of law, has

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17109

EXHIBIT NO. 109

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been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument.”

At its public meeting held on January 4, 2011, the Board voted to send the attached proposed order to the parties and specified that written exceptions and arguments must be filed with the Office of Zoning, and served upon the other parties, no later than Friday, February 4, 2011. The Board further ruled that responses to such written statements must be filed and served no later than Tuesday, February 22, 2011.

Questions should be addressed to Mr. Clifford W. Moy, Secretary to the Board of Zoning Adjustment, at (202) 727-6311.

Regards,


JAMISON L. WEINBAUM
Director, Office of Zoning

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17109-C

As Director of the Office of Zoning, I hereby certify and attest that on JAN 07 2011, a copy of the proposed order in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Kalorama Citizens Association
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Montrose, LLC
c/o Mary Carolyn Brown, Esq.
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ATTESTED BY: *Jamison L. Weinbaum*
JAMISON L. WEINBAUM
Director, Office of Zoning

909.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17109-C of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permits Nos. B455571 and B455876, dated October 6 and 13, 2003, respectively, to Montrose, LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct an apartment building in the R-5-D District at 1819 Belmont Road, N.W., and from the issuance of the original Building Permit No. B449218, dated March 11, 2003

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004

DECISION DATES: June 22, 2004, December 7, 2004, and February 1, 2005

**DATE OF DECISION
ON MOTION FOR
RECONSIDERATION
AND PARTIAL
REHEARING:** December 6, 2005

**DATE OF D.C. COURT
OF APPEALS
DECISION REMANDING
CASE TO BOARD:** October 25, 2007

**DATE OF DECISION
AFTER REMAND:** July 20, 2010

PROPOSED DECISION AND ORDER AFTER REMAND

On November 10, 2003, the Kalorama Citizens Association (“KCA”) filed this appeal with the Office of Zoning (“OZ”) alleging that Building Permits Nos. B455571, B455876, and B449218, all pertaining to construction at 1819 Belmont Road, N.W. (“subject property”), were issued erroneously by the Department of Consumer and Regulatory Affairs (“DCRA”). The Board of Zoning Adjustment (“BZA” or “Board”) held a properly noticed hearing on the appeal, as well as

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several decision meetings, and at the final decision meeting on February 1, 2005, decided to partially grant and partially deny the appeal.

The Board's decision was memorialized in Order No. 17109, dated November 8, 2005, which granted the appeal on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act of 1910 ("Height Act") (36 Stat. 452, D.C. Official Code §§ 6-601.01 – 6-601.09 (2001)), but denied the appeal with respect to the penthouse setback requirements under both the Height Act and the Zoning Regulations, and with respect to the floor area ratio ("FAR") calculations. Order No. 17109-A, dated April 4, 2006, denied KCA's request for reconsideration of certain aspects of the Board's decision, including whether a sixth level area denoted as "attic" space on the plans would be more properly characterized as a "mezzanine" or "balcony," thus requiring its inclusion in FAR calculations.

KCA appealed to the District of Columbia Court of Appeals ("Court") that part of Order No. 17109 which denied its BZA appeal with respect to the FAR calculations. On appeal to the Court, KCA's arguments as to the FAR issue went to two areas of the FAR calculations. As to the first – whether the basement was properly measured for the purposes of these calculations – the Court upheld the Board's order. The second issue before the Court was whether the Board had adequately explained its apparent conclusion that the sixth level of the building is an "attic," making the space potentially not countable towards FAR. The Court found that the Board had not, and remanded the case for the Board to resolve the issue. Because the Zoning Regulations do not contain a definition for the term "attic," the Court concluded that, pursuant to 11 DCMR § 199.2(g), the Board must determine whether the space falls within one of the three sub-definitions of "attic" set forth in *Webster's Unabridged Dictionary* ("*Webster's Dictionary*").

Because the Court held that the Board did not address the attic issue with sufficient particularity, it also held that the Board had not accorded Advisory Neighborhood Commission ("ANC") 1C, the ANC within which the subject property is located, the great weight to which it is entitled, pursuant to D.C. Official Code § 1-309.10(d) (2001). Therefore, the case was also remanded for the Board to make specific findings with respect to the ANC's concern that the sixth level does not fall within the definition of "attic" and to explain why the Board does or does not agree with the ANC.

On June 14, 2010, the Board issued a Procedural Order to the parties permitting them to file legal memoranda, based on the record as it existed on the date Order No. 17109 was issued, analyzing the applicability of each of the three sub-definitions of "attic" to the space at issue, and drawing conclusions as to the effect on FAR calculations. The Procedural Order also stated that the Board would not revisit the Board holding that the space provided structural headroom of less than six feet, six inches, which is the second element that must be satisfied for attic space to be excluded from FAR. Finally, the Order indicated that the Board would deliberate on the attic issue at a Special Public Meeting on July 20, 2010.

At the Special Public Meeting on July 20, 2010, the Board deliberated on the attic issue and decided that the space denoted as "attic space" on the original plans submitted with the

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application is indeed attic space because it falls within the third sub-definition. Since the Board had already concluded that the space provided structural headroom of less than six feet, six inches, the Board reaffirmed its conclusion that the space was properly excluded from the FAR computation and therefore again denied that portion of the appeal.

The Board members participating in this remand did not personally hear the evidence in this case. Therefore, at its public meeting on January 4, 2011, the Board voted to send this Proposed Order to the parties to afford them an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509(d) (2001). [INSERT DESCRIPTION OF ANY EXCEPTIONS RECEIVED AND DISCUSSION OF THEIR SUBSTANCE.]

This Order, No. 17109-C, reflects the Board's Findings of Fact and Conclusions of Law only on the two issues remanded by the Court – the attic issue and ANC great weight – and incorporates by reference Order No. 17109. This Order, therefore, will not restate all facts concerning the subject property, but only those relevant to the remand issues, and if a relevant factual finding also appeared in Order No. 17109, it is so noted herein.

FINDINGS OF FACT

1. The plans submitted with the application depict a five-story building plus basement, with each story approximately 10 feet high. The plans also depict a sixth level of the building that is six feet, five and one-quarter inches high to the ceiling. (Exhibit 100, Attached Plans.)
2. The plans denote the sixth level as an "attic."
3. The sixth level of the subject building provides less than six feet, six inches of structural headroom. (See, Finding of Fact No. 31 in Order No. 17109.)
4. There are "collar ties" forming part of the unfinished "ceiling" of the building's sixth level, which are part of the building's structural members and are placed six feet, five and one-quarter inches above that level's floor.
5. "Collar tie" is defined by *Webster's Dictionary* as "a board used to prevent the roof framing from spreading or sagging."
6. There is no finished ceiling to the sixth level because interspersed among the collar ties and ceiling rafters of the sixth level is open space; therefore, there is no full ceiling or floor between the floor of the sixth level and the roof of the building.
7. The collar ties in the subject building are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction. (See, Finding of Fact No. 32 in Order No. 17109.)
8. The sixth level of the building is at least partially within the roof framing of the building.
9. Because there is no finished ceiling to the sixth level, all of that level is immediately below the roof of the building. Part of the roof of the building is flat and the sixth level is

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just below it. Part of the roof of the building is peaked, and there is an open area between the sixth-level ceiling rafters/collar ties and the peaked roof.

CONCLUSIONS OF LAW

The calculation of “gross floor area” of a building includes only attic space that provides “structural headroom of six feet, six inches (6 ft., 6 in.) or more.” (11 DCMR § 199.1, definition of “Gross floor area.”) In Order No. 17109, the Board stated its determination that the sixth level does not provide structural headroom of at least six feet, six inches. (Order No. 17109, at 14.) In that Order, however, the Board failed to find specifically whether the sixth level was an attic. This omission prompted a remand from the Court of Appeals with instructions that the Board determine whether the sixth level fell within one of the three sub-definitions of “attic” in *Webster’s Dictionary*. The Board now holds that the sixth level is an attic, and specifically falls within the third sub-definition.

Section 199.2 of the Zoning Regulations directs the Board to *Webster’s Dictionary* for words not defined by the Regulations themselves. (11 DCMR § 199.2.) “Attic” is not defined by the Regulations, so the Board turns to the tripartite definition of “attic” in *Webster’s Dictionary* set out below:

- a. a low story or wall above the main order or orders of a façade in the classical styles;
- b. a room or rooms behind an attic;
- c. the part of a building immediately below the roof and wholly or partly within the roof framing: a garret or storage space under the roof.

(*Webster’s Unabridged Third New International Dictionary*.) Sub-definition (b) does not provide any illumination of the question before the Board and is somewhat difficult to interpret as it uses the word being defined in the definition.

Sub-definition (a) is more helpful, and may or may not apply to the sixth level of the subject building. There is some question as to its precise meaning, and as to the nature of a “façade in the classical styles.”

Sub-definition (c), however, provides the Board with an understandable, workable definition of “attic” within which the sixth level of the subject building clearly falls. Sub-definition (c) has two parts to it, both of which apply to the sixth level here. First, an attic is “the part of the building immediately below the roof.” The sixth level is immediately below the roof. This is evident under the flat-roofed part of the building, where the roof is at the top of the sixth level. It is less clear under the peaked-roof part of the building because immediately above the ceiling rafter/collar ties at the top of the sixth level is an open space that varies in height due to the peak of the roof.

Under the peaked-roof area, the floor of the sixth level is further from the roof of the building than it is under the flat-roofed area. Under the peak, the sixth level floor is anywhere from

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